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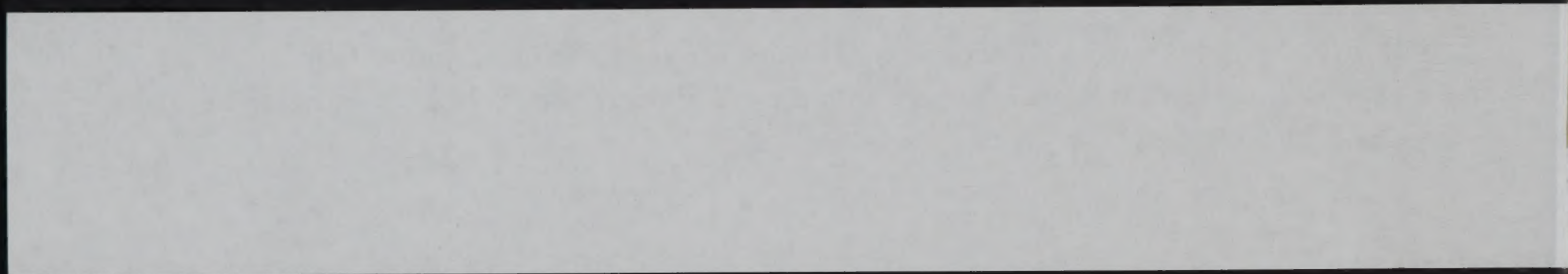
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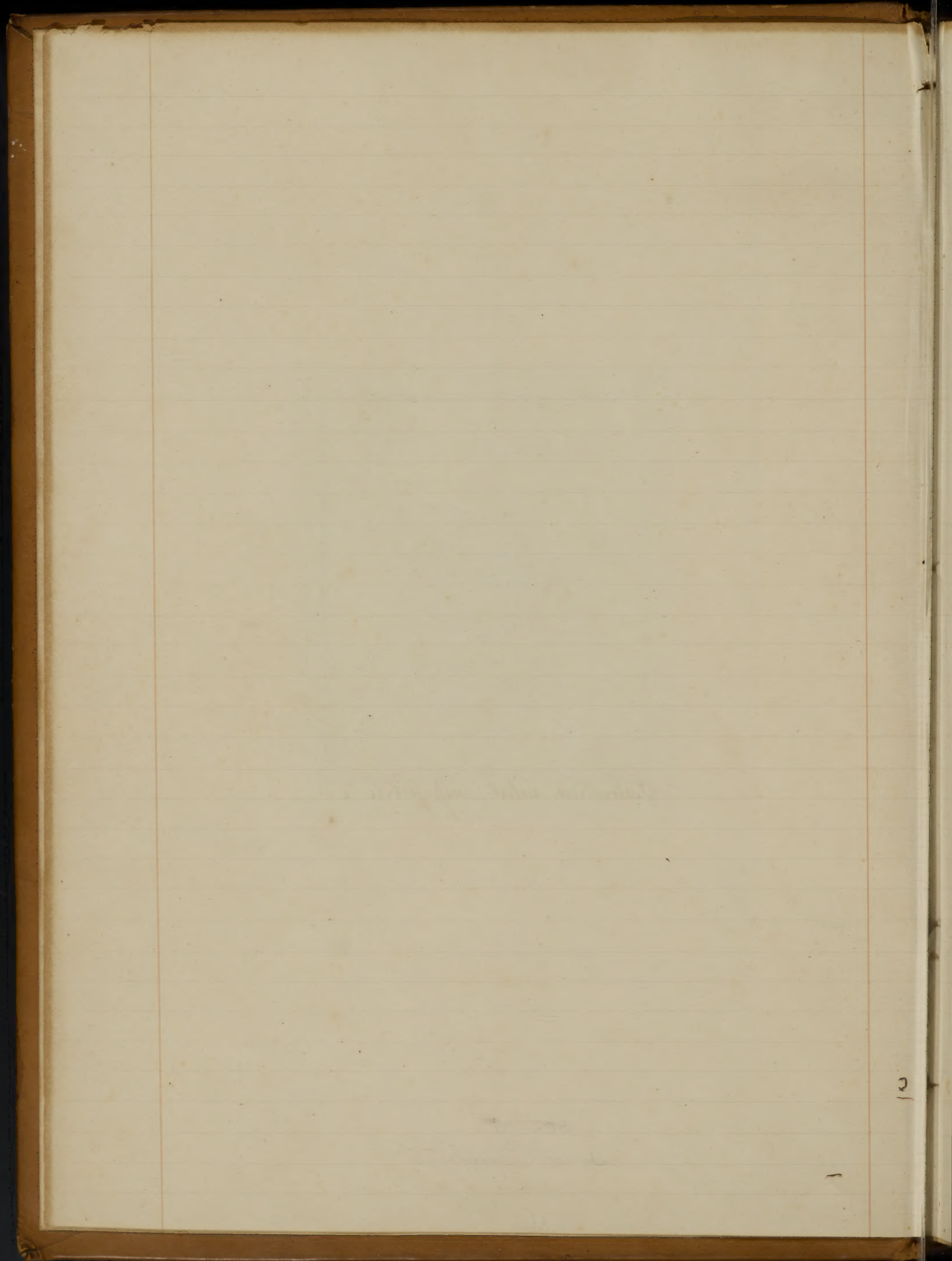
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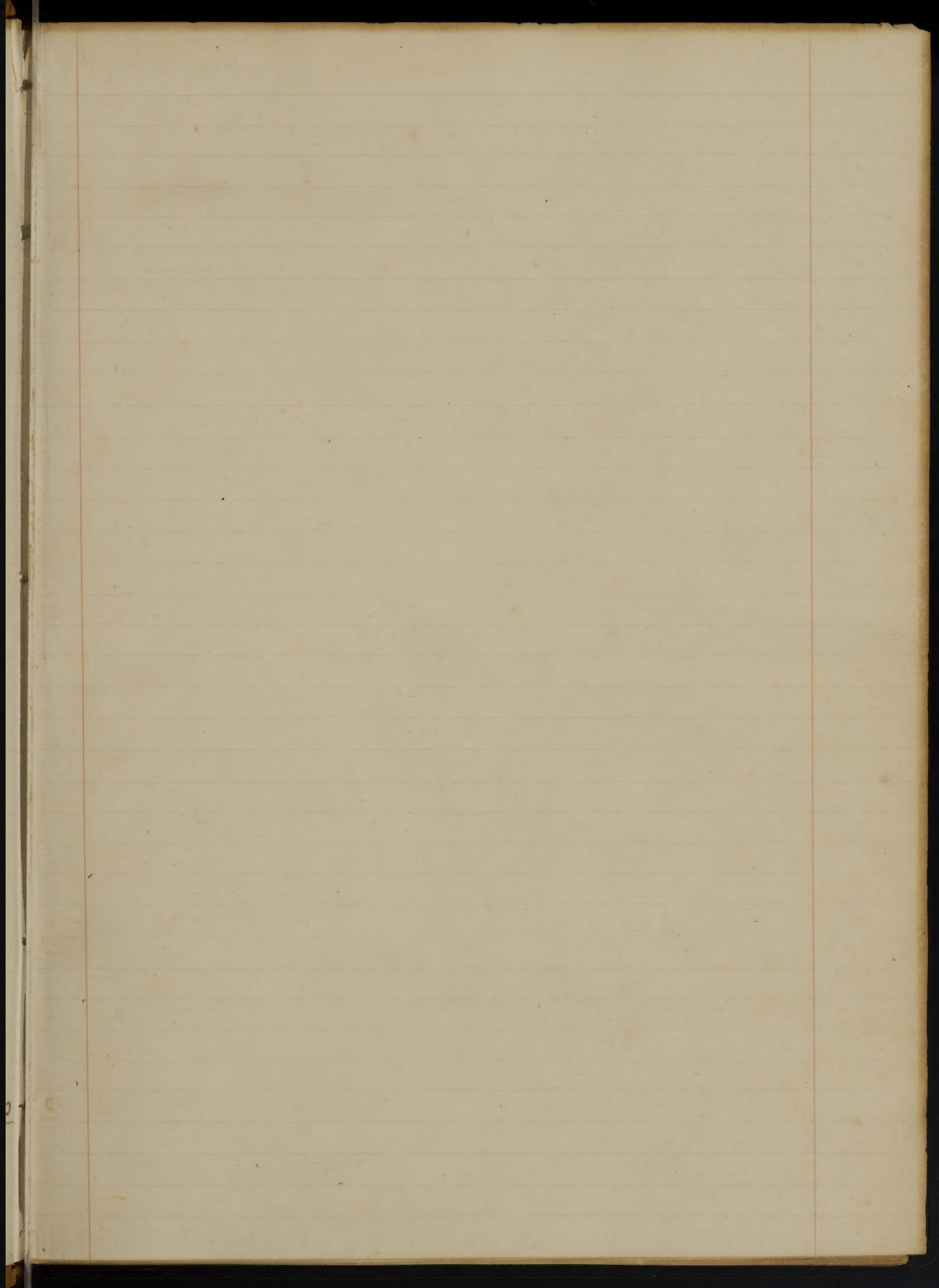
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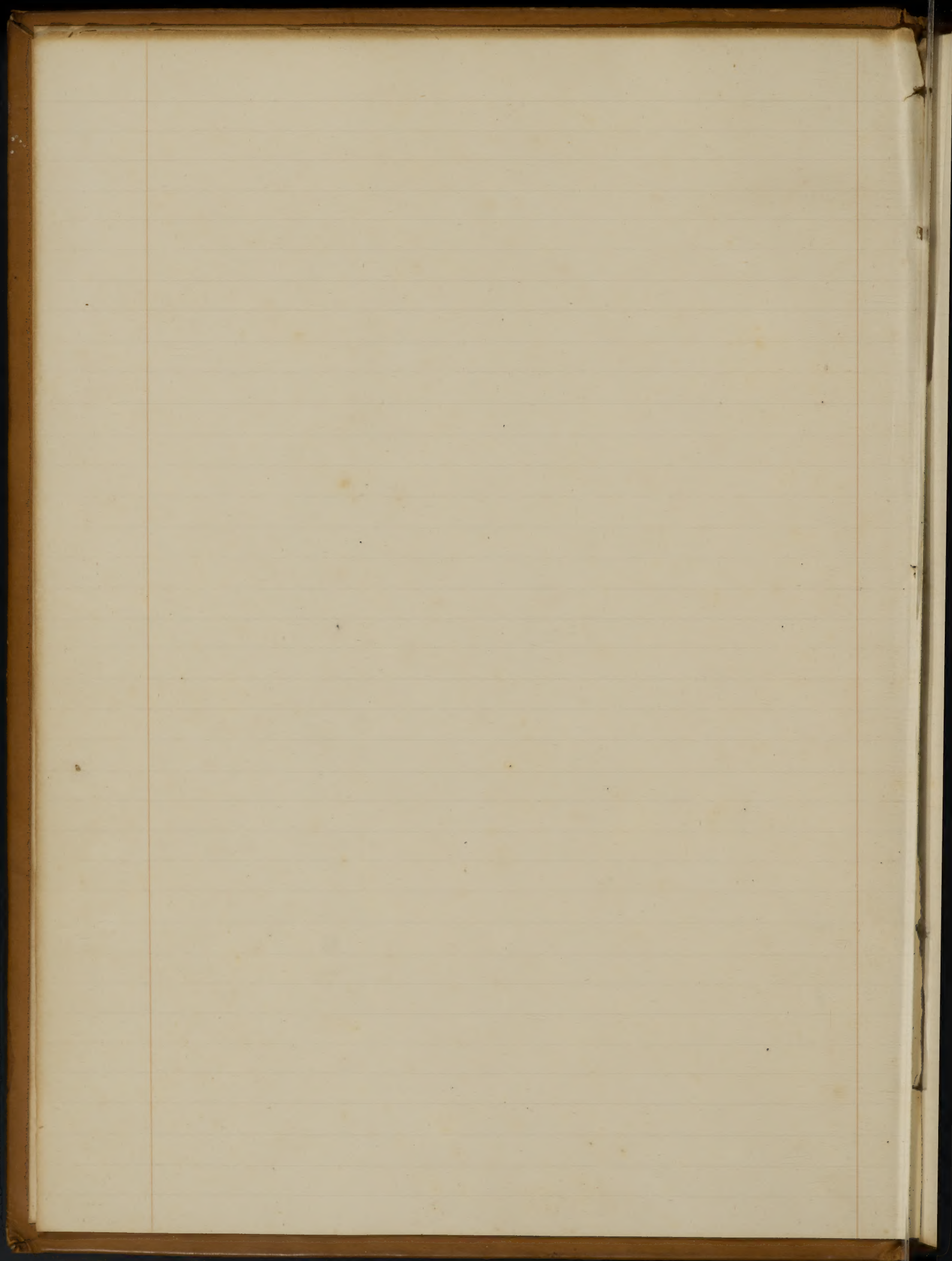
"Industrie nihil impossibile".

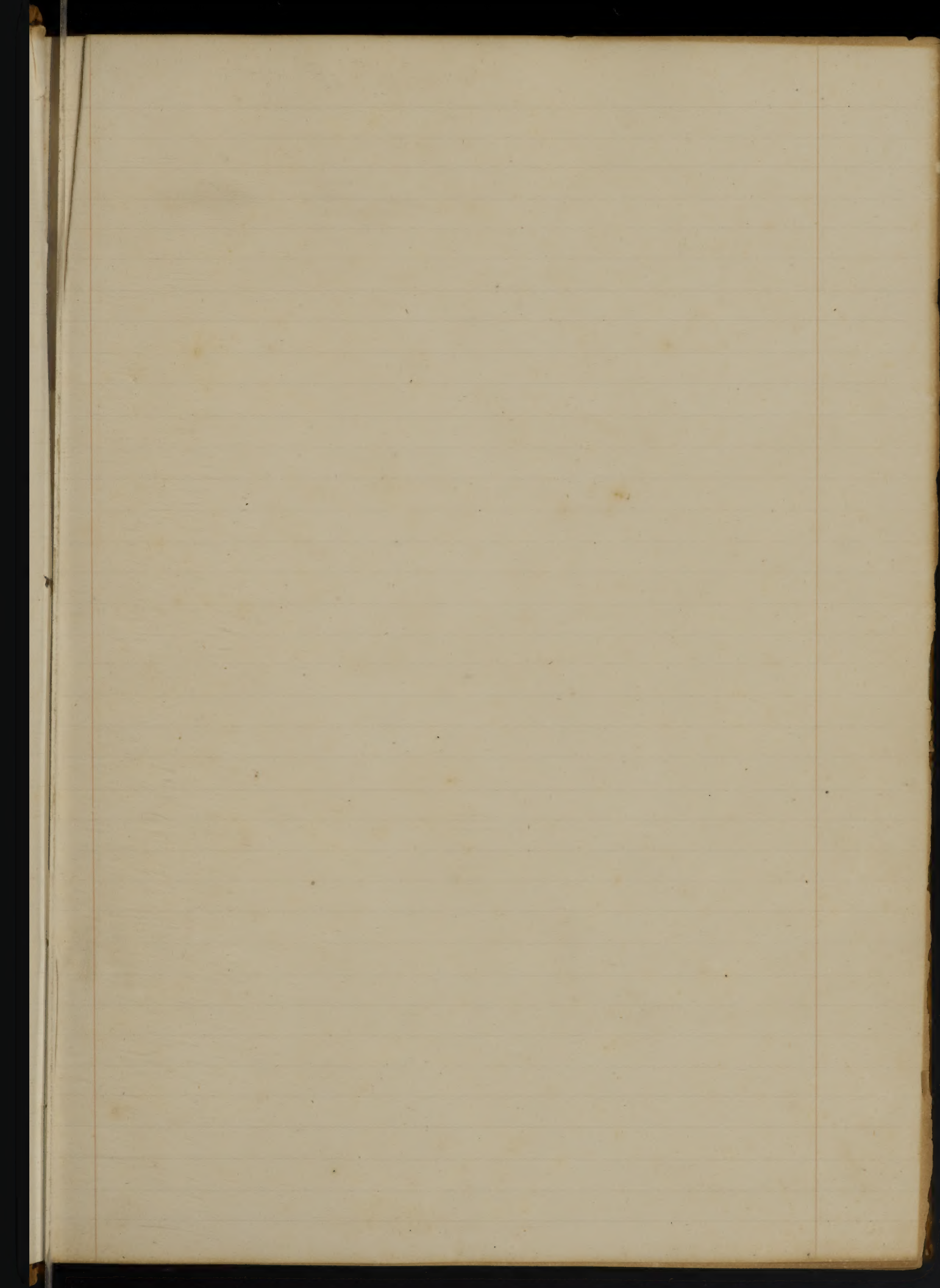




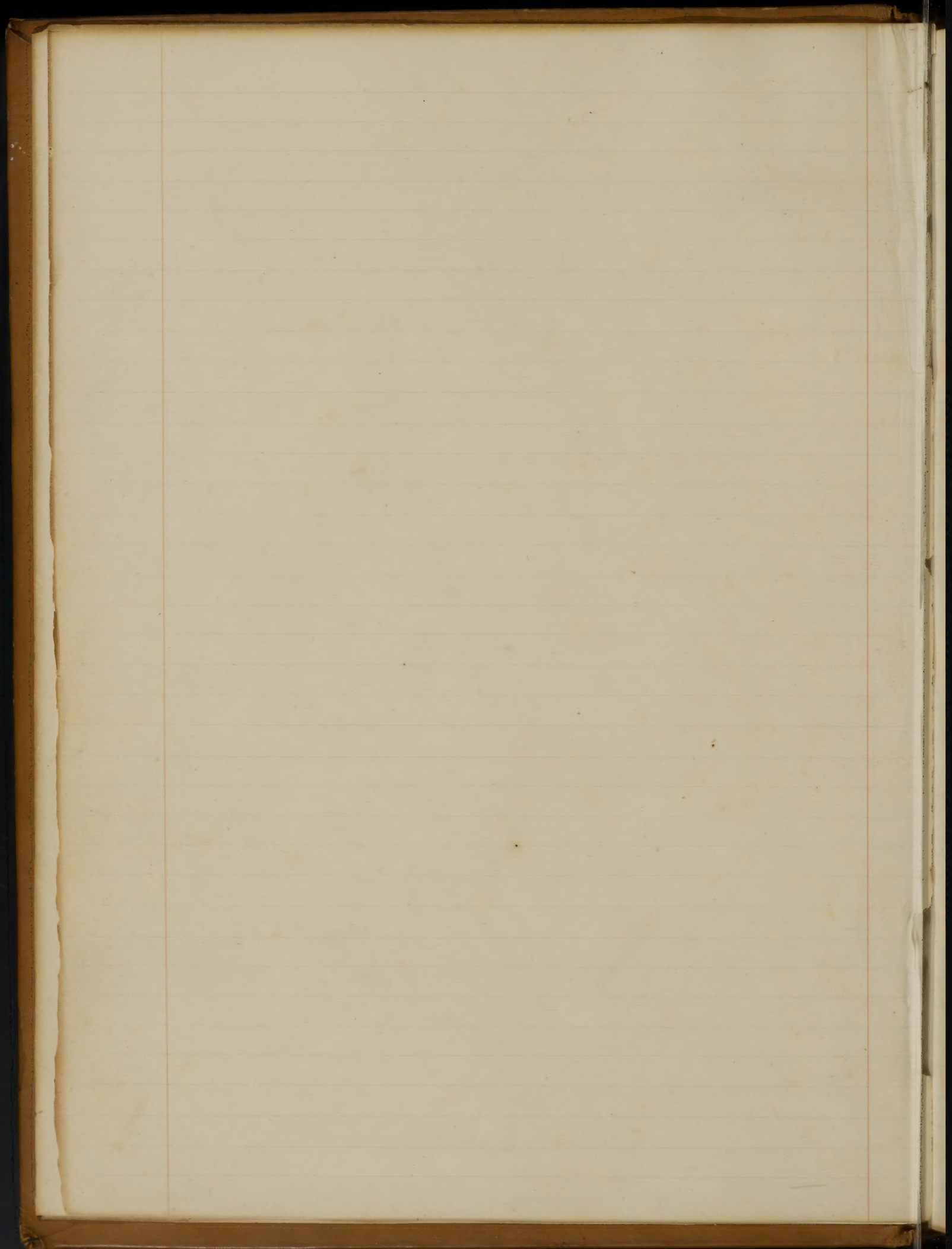






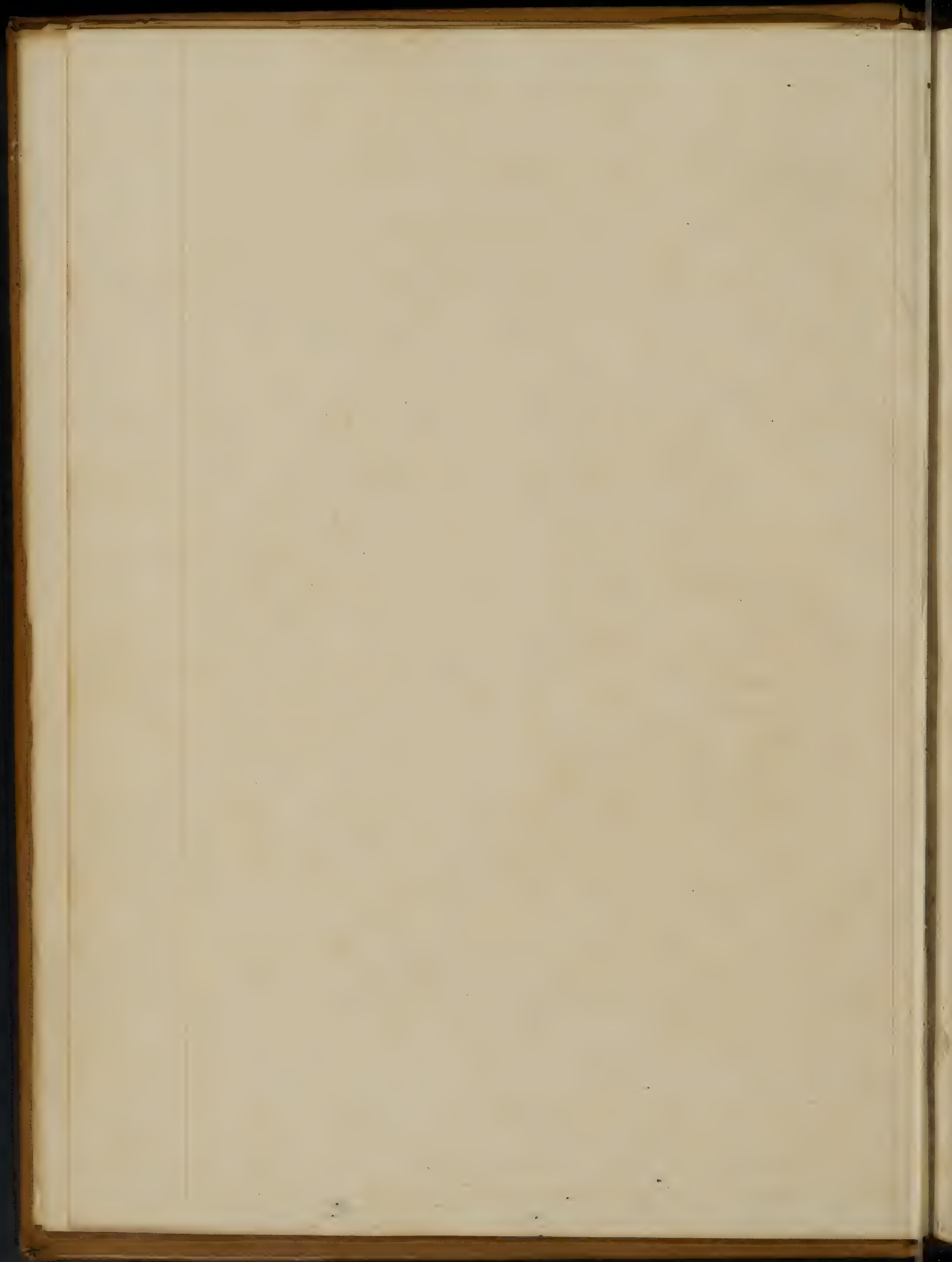












## Municipal Law.

§ 80. 1.

Municipal Law is a rule of civil conduct prescribed by a Supreme Power in a State commanding what is right & prohibiting what is wrong. 103th. 44.

The word Law in its most comprehensive sense signifies "a rule of action" prescribed by some superior, & this is predicable of all kinds of actions. 103th. 38.

By "law of nations" is meant that Law wh. nature prescribes to sovereign States or Nations - "Duda naturalis ratio inter homines constituit"attel. 1. 8. Pref.

But Municipal law of wh. it is my present purpose to treat, has been defined to be "a rule of civil conduct prescribed by a Sup. power of a State, commanding what is right & prohibiting what is wrong."

This last part is surplusage & is diff. from what is called natural law. wh. is a rule of moral conduct & binding upon the whole human family; Whereas Municipal law regards its subjects as members of society or community, regarding only those rights which arise in society. "Lex civile est quod quisque sibi populus constituit. & hence a characteristic difference is, that Municipal Law is a Rule of civil, the Natural - the rule of moral conduct. 103th. 45.

This Rule, to correspond with the definition before laid down must be permanent, universal & uniform. By "permanent" is not meant perpetual & immutable, but that it be a constant rule & not an occass.



ional one (i.e.) continuing either indefinitely or for a certain period of time.

By "uniform" is meant that it is genl. in its operation so far as it extends. By "universal" is merely meant that it shall be genl. within its own limits, for local usages or laws wh. prevail only within one part of y<sup>e</sup> Kingdom may constitute a part of y<sup>e</sup> municipal law. 103bk. 43.

The definition requires yt. this rule be promulgated & yt. it shall not be "retroactive" by which is meant a law wh. affects transactions wh. took place before y<sup>e</sup> law itself was enacted.

But there is a material diff. between a "retroactive" or "retrospective" law, & those laws wh. are denominated "ex post facto".

2. A retrospective law is any wh. relates to civil or criminal concerns, wh. has a retroactive operation. Whereas an "ex post facto" law is applicable only to penal laws. "Retroactive" is a genus, of which "ex post facto" is a species. The latter are always penal laws, the former, either penal or remedial. 3 Dall. 348. 380. 391.

It often happens, that both have a retroactive operation, tho' y<sup>e</sup> definition of municipal law virtually prohibits it.

The Constitution of the United States prohibits y<sup>e</sup> Legislatures of several States passing any "ex post facto" laws by Art. 1. The subject is well explained in 3 Dall. 1386. 91. The rule must be prescribed by y<sup>e</sup> "Supreme power" by wh. is meant y<sup>e</sup> Legislature or law-making power, & this power necessarily involves y<sup>e</sup> right of repealing. 103bk. 40. 90.

Blackstone has given rules in violation to y<sup>e</sup> interpretation of laws. 103bk. 59. 61.

## Construction of Laws.

I. Words are to be understood fully according to their most popular signification. Terms of art, according to y interpretation of them by y learned in yt. art. q q com. Law Technicks. "Cuiuslibet in sua arte credendum est" 1 Bk. 59. Co. Bac. ab. 647. 19. Vin. 513. 6 Mod. 143. 2 Roll. 253. 1 Dow. com. 402.

II. When words are ambiguous it is proper to consult y context, & thus establish this meaning by their connexion & also to compare, the law with other laws relating to y same subject. By this mode "words" in se dubious are often rendered clear & intelligible. 1 Bk. 60. 1 Ves. 263. Palm. 485. 1 Dow. 03. Led. Ray. 1128. 3 D. 11<sup>ms</sup>. 185. 4 Bac. 645. 2 Bro. 206.

"nosatur a sociis"

III. Words are always to be understood with reference to the apparent subject matter. 1 Bk. 60.

IV. The effects & consequences of y diff. constructions are to be regarded. 1 Bk. 61. 4 Bac. 652. 1 Mod. 244.

V. The last & yt. wh. is "instar omnium, & to st. all y foregoing are subordinate, is yt. y spirit & reason of y law, is y law itself - "cessante ratione legis cessat ipsa lex" is a maxim of y com. law, & with an exception, to y penal law, when discovered conclusive in all questions of construction. The reason & spirit of y penal laws may be consulted to take a party out of them, but when he is "within y law letter" he never can be brought within y spirit. 1 Bk. 58, 61. 2 Brod. 232. 206. 19. Vin. 513. 4 Bac. 644. 1 Co. 24. D. 3. Bk. 431.

From y last great & cardinal rule, arises, what is called y Eq. of y Law, & that no other construction can comply with y intention of y Lawgiver. For it is self-evid. yt. y reason & spirit constitute y essence of y Law & not y formal Ex. in its common acceptance. 1 Bk. 62. 19.

Vin. 514. 26 Co. Lit. 245. 3 Bk. 431.



3. Municipal Law is divided into two branches, "Lex scripta" & "Lex non scripta". 1 Bk. 62.

The unwritten law includes not only genl. questions properly so called in y con. law, but also y particular customs of certain parts of y realm, & likewise those particular laws that are by custom observed only in certain pts. of jurisdictions. 1 Bk. 63.

The con. law is sometimes used as synonymous with y "unwritten law" <sup>best understood</sup> wh. includes 2 branches, namely, the con. law, local customs, & particular customs or laws.

4. The unwritten law is a genus & wh. y con. law is a species - is so called because its original institution is not set down in writing like an act or stat. i.e. it does not derive its force from an authoritative writing, record or roll, but from immemorial usage "whence y memory of man runneth not to y contrary" 1 Bk. 53. 74.

First. The first & most important branch of y unwritten law, is y con. law, <sup>so called</sup> either to distinguish it from other laws, as; civil or canon, or because it is common to y whole realm, & it is defined to be a "rule of civil conduct" founded on genl. custom & extending throughout y whole realm or community. - It is mentioned by Edw. y elder after y abolition of provincial customs, & by Alfred.

Customs wh. are y foundation of y con. law must be immemorial; & custom to be immemorial must extend back beyond y time of legal memory, wh. in Eng. is dated from y accession of Rich<sup>d</sup> 1<sup>st</sup> 1189. So that no custom has y effect of Law unless it has existed with interruption from y<sup>t</sup>. time, but this positive rule regulating y extent of legal memory can't apply to us. 1 Bk. 68. 2 Bk. 21. 2 Co. 238. 9. 2 Roll. 239.

5. But if y con. law be "written", where is it, or any of its branches to be found? Jus. Blackstone answers y enquiry: That it

is to be sought for in y records of y Cts. of justice - in books of Reports & Judicial decisions - & in y Treatises of y learned sages of y Profession. 1 Bk. 63.4

These do not "per se" constitute y body of y "lex non scripta" or com. law, as y Rolls of Parliamt. & y Stat. laws; for if they were the law, it wd. then be y unwritten law & a judicial decision co. no more be overruled or questioned than a Stat. - But this is contradicted by daily experience & there is no impropriety in overruling them - but they are "prima facie" evid. of what y law is & always has been. 1 Bk. 63.71.

These laws were expounded or ascertained by y Judges of y Cts. of justice, y depositions & recds. of y law. Bk. 69. By y term "Precedent" is meant, a former judicial decision on y point in question & is only evid. of what y Law is. - It is a genl. rule, notwithstanding, yt. a precedent is to be followed unless plainly absurd, or flatly unjust, & not to be overruled merely because y reasons of it are not discovered. It is authoritative & binding unless shown to be absurd or unjust, & he who objects to y precedent or Law of it, takes y "onus probandi" on him self, & must show its fallacy, absurdity or injustice -

In this country we have right to overrule all determinations in y Eng. Law that are clearly unjust, but farther than this wd. overthrow y whole system of Jurisprudence. This rule is so indispensable to y preservation of uniformity in y system, yt. Buller observes yt. "stare decisis" is y most important maxim in y Law. 1 Bk. 69.70. 1 East. 495.

But how do y com. laws come into existence? In point of fact it was built up by y successive judges of West Hall - They were in fact y Law-givers.

This theory however may not appear to answer y objection naturally arising out of y definition viz. "That y sove-



reign power is wanting. - But y answer to this is, yt. the supreme power, by genl. usage, sanctioned y ad-  
option, for no number of states. however able they  
may be, can administer justice without y unwritten  
law. -

There are many doctrines in y com. law sh.  
in point of fact have originated since y accession of  
Richd. 1. y. 1. 1189. as y doctrines of y executory devises  
sh. was instituted in y reign of Eliz. & indeed the  
mercantile Law was never fully understood till y time  
of Ed. Mansfield -

These decisions in new cases then do not create law but  
merely promulgate it (i.e.) they are only regarded  
as evd. of what y law immemorially was & do. have  
been declared to be, had y question originated be-  
fore y time of Rich. 1.

The Written Law is itself merely, never can  
furnish a complete remedy, In y most simple statu-  
tory provisions. The Ct. is called upon to carry y law  
into effect. make an unwritten law "pro re nata"  
or adopt one. I will illustrate this by one example,  
suppose y unwritten law unknown, & a Stat. made  
giving a person a remedy for y assault & battery -  
How a proceeding must be devised to carry it into  
effect, I say, there is no knowing how y remedy is  
to be recorded - Well - suppose y Stat. provided for  
a recovery by action. The question then presents itself -  
What is an action? It says Trespass. What is Trespass?  
It defines it. How is to be framed? By Writ. - What  
is a Writ? If there is any thing more provided by Stat.  
as Pleadings or Issues - What are they & how to be tried?  
From y commencement of y Issue to y return of final  
process. witht. an unwritten law made or established  
as they proceed, the Ct. d. never regularly admin-  
ister justice -

Conformable to this view res y fact bein, that entire  
branches of y com. law have been brought into exist-  
ence long since Richd. 1. & are immemorial, because they

are evid. of nat<sup>y</sup> & immemorial rights & perfect obligation - now are & that they always have been.

II. Particular Customs, which constitute a branch of unwritten law, are local usages, not common throughout of whole realm or State, but confined to local limits.

These in Eng. are probably the remains of those provincial customs, out of wh. y com. law was first collected by Gloucest. - 1 Blk. 74. 2 ib. 253. Whether there are any particular customs in U.S. is doubtful.

Particular customs are not regularly recognised in Ct. of justice, as they are not presumed judicially to know them, not being public or genl. rules.

When such is to be made a ground of claim or defence it must be specially pleaded i.e. it must be cited in Declaration or Plea & its existence must be proved as a matter of fact to the Jury. Like other matters of fact, unless same has been before determined in y same Ct. & records, in wh. y question again arises - in wh. case any further inquiry is precluded. Doug. 355. 365. Lit. sec. 265. Co. Lit. 75. 1 Blk. 76.

But y customs of "Gavelkind" & "Borough Eng." are exceptions to the last rule (i.e.) they need not be proved, being notorious thro-out y whole realm - They must be specially pleaded - Co. Lit. 175. Co. Lit. 75. 1 Blk. 76.

That Sir Wm. Blackstone shd. have asserted that Law Merchant is a particular custom, tho in his first book he does so call it, appears to me remarkable.

But y proposition is certainly incorrect - as it is not in any one sense, nor has it a single trait of that class of laws.

It is indeed confined to particular subjects & relates only to merc. The truth is, y<sup>t</sup>. y law merchant, tho governing particular transactions, is a customary law extending thro-out y whole realm, - wh. of itself shows y<sup>t</sup>. it is a branch of y genl. com. law & y<sup>t</sup> need not be specially pleaded. 1 Blk. 75. 3 ib. 436. 2 ib. 459. 617. Ch. Bills. 13. 28. 189.



2 Burr. 1218. 22. 4 J.R. 208. Le. Rep. 175. Com. 655. 45.  
2 Hunt. 295. 310. 1 Bk. Rep. 298.

Moreover Law Merchant is not attended with y<sup>e</sup> incidents of particular customs for it need not be specially pleaded (Salk. 125) nor tried by a jury or proved by witnesses -

It is however so. yt. if new cases arise in wh. it is doubtful, it may be proved by witnesses; But this is not vis. to be offered to a jury to prove a matter of fact, tho' it has been so. do. & I think contrary to principle. But y<sup>e</sup> Ct. may take y<sup>e</sup> evid. of skilful merchants as to what y<sup>e</sup> usage of Merchants is, when they themselves are in doubt - as they do. consult a dictionary for y<sup>e</sup> signification of doubtful words. 1 Bk. 76.8. Co. Lit. 15.4. & Co. 58. 1 Bk. Rep. 295.8. Long. 72.3. 653. These must however be new cases in wh. the law is doubtful. Ch. R. 28. 209. Burr. 1206. 8. 22. 4 J. R. 208. Lit. sec. 212.

Blackstone says to make a particular custom good y<sup>e</sup> following are necessary requisites viz. 1. Immemorial usage. 2. It must have been continued. 3. It must have been peaceable & acquiesced in. 4. It must be reasonable or not unreasonable. 5. Certain. 6. Compulsory when established. 7. They must be consistent with <sup>the Customs</sup> each other. 1 Bk. 76.8. 1 Bk. 76.3.

Particular customs in derogation of y<sup>e</sup> com. law - are to be construed strictly (i.e.) they cannot be extended by construction - 1 Bk. 78.9.

III. Certain Particular Laws, adopted by custom and used only by particular jurisdictions & Cts. constitute y<sup>e</sup> 3<sup>d</sup> branch of y<sup>e</sup> unwritten law (i.e.) y<sup>e</sup> civil & ecclesiastical Law.

Particular customs are confined to local limits, but particular laws are not. It is immaterial where

any cause of action arose, provided it is but in one of these  
 Cts. in wh. those laws are adopted (i.e., y Military-  
 Maritime - Ecclesiastical & y Academic in Eng.  
 which have adopted y civil & canon Laws, i.e. y civil  
 & ecclesiastical Law of y Roman Empire. 1031k. 59.

1031k. 67. 79. 82. 3

In this country there are no ecclesiastical Cts. the Maritime  
 law is adopted in our Civil Cts. not only in its decip-  
 ions, but its rules of evidence.

I presume to say y civil & canon Laws possess one  
 original form in Eng. but have become a part of the  
 com. law by adoption - wh. may be by immemorial  
 usage, where they form a part of y unwritten law in  
 y above Cts. or by a Legislative act, when they be-  
 come a part of y written law of y land.

1031k. 79. 80. Tucker's 1031k. 411. 29.

The com. law of Eng. & y ancient Sto. are "prima  
 facie" y law of this country, but they derive their  
 force by a similar sanction (i.e.) by adoption  
 or legal provision, for I assert y civil & canon  
 laws as such, are unknown in our country, tho' as far  
 as they are incorporated with y public law or laws of  
 Nations, they may be here known; but as the laws of Eng.  
 they have no more inherent force, in this country, than  
 a Roman code wd. have in Eng. They are binding  
 in no other sense; than y com. & St. Eng. are binding-  
 viz. by adoption.

Tucker's 1031k.  
 411. 29.

Various States of y Union have adopted particular  
 branches of y written law of Eng. & whenever this is y  
 case, they are binding by force of this Legislative pro-  
 vision & not by any inherent authority they possessed.

They are thus made a part of y written law of y land, as  
 y adoption by usage & custom of Cts. makes them a part  
 of y unwritten law - But still as this country was  
 originally settled by y Eng. they brought with them,  
 so much of their law as then existed. as their birthright, wh. Laws



formed y Basis on wh. y superstructure of our code of laws has been built.

So that now y com. law of Eng. is "prima facie" y law of every state in y union. both because it was their inheritance & because sanctioned by adoption & immemorial usage. And hence our Cts can't reject it, unless plainly unjust or inapplicable to the circumstances of our country, in either of wh. cases, it is manifest yt. our judges wd. not consider it binding.

Thus there are entire branches of y com. law wh. from the diff. form of our govern<sup>t</sup> can't apply to us - e.g. villenage & other services wh. only exist in Monarchical Governments - & so of those precedents, y binding force of wh. has been much lamented by y Eng. judges on account of their manifest injustice -

Every country must have an Unwritten Law, with<sup>out</sup> wh. there wd. be a failure of Justice. A Ct. of Justice can't administer Justice in one single instance with<sup>out</sup> it, wh. they must either drop or create "pro re nata" 1 Tuck. 411. 29.

A question formerly arose, whether it was possible consistently with y Union, that any State sh. have a com. law of its own, distinct from that of Eng. This question has been so long & in so many of y States affirmatively settled, that it is now mere speculative theory -

I do not entertain a doubt but yt. each State might have a com. law, distinct in some respects, & y only plausible objection to this demonstrable proposition is, that we can't have a custom old enough to be legally a custom; & if we live to y end of time, can't have, according to y Eng. arbitrary rule. But that a custom must go back to Rich. is a rule entirely inapplicable to our circum-

stances, as we were then not in existence.

The truth is, the objection lies "in a circle", for y question is, can we have a com. law in any respect diff. from Eng. law? Objection says no, because if we do, it wd. be diff. from y com. law, as it wd. not be sanctioned by age - That is no more than saying "we can't" because we can't". But y question is settled by every Statute having some sanction or rule on this subject diff. from y com. law of Eng.

2. The second branch of "Municipal Law" is y "written law" or *lex scripta*, consisting of Sts. yt. is, acts of y Legislature. It has been made a question, how far y Eng. Sts. are binding in this country. It is pretty generally agreed yt. y ancient Eng. Sts. are binding here on y same principle yt. y com. law of Eng. is i.e. "*prima facie*" if y reason assigned in y Eng. books, why any of them Sts. are binding on us, is, yt. our ancestors brought over with them on y colonization of this country, as much of their parent law as was in existence at yt. time. They considered them as their birth-right, as did y Eng. jurists with respect to all their colonies.

In analogy to this distinction, professional men have determined, yt. those passed before our "Revolution" at least before our colonization are binding, but those passed since our colonization are not "*prima facie*" obligatory on us - The line of division is fixed in the reign of Hen. 8<sup>th</sup>. The Sts. passed during y reign of y latter, are not even "*prima facie*" law in this country. The whole law of entails is derived from y R. "*de donis*". All actions wh. sound in case, are derived from West. 2<sup>d</sup>. The H. "*de donis*" giving an action to Executors & Adms in y case of "Fort" is adopt. ex in most of y States. )

With respect to y com. law a distinction between ancient & modern wd. be a solecism - A modern decision in derogation of y ancient rules of y supposed



com. law, does not make a new law, but only declares what  $\gamma$  com. law originally was.

In  $\gamma$  yr. Books we "prima facie" evide. of  $\gamma$  com. law of  $\gamma$  country,  $\gamma$  reports of  $\gamma$  decisions of Lds. of Mansfield & Kenyon are equally so, for they have only declared what  $\gamma$  com. law immemorially has been, or in other words made  $\gamma$  application of an old principle to a new set of facts. But  $\gamma$  distinction between ancient & Modern Hs. is perfectly intelligible.

When I speak of ancient Hs. being binding I do not mean yt. they are binding upon our Legislatures. They doubtless can alter or retract them as they please - but I mean yt. our Cts. are "prima facie" bound by them. To sum up  $\gamma$  whole,  $\gamma$  ancient H. law of Eng. as such, is "prima facie" our law, except so far as our Legislatures have altered it. But those Hs. sh. have been enacted since our colonisation & unquestionably since our Revolution, are not so even "prima facie" (Fulk. Bk. 106.8. 380.4. 391. 10312. 88. & Co. 20. Poo. 82. 20M. 15. Talk. 411. 66. Kirk. 369.

In some of  $\gamma$  U. S.  $\gamma$  body of  $\gamma$  Eng. Hs. have been adopted, down to a certain period, by  $\gamma$  Legislatures, as in N. York & Louisiana.

### Of the Diff. kinds of Statutes.

I. All Stats. are either public or private i.e. genl. or special. 1031k. 85.

A Public H. is one sh. regards  $\gamma$  whole community at large.

A Private H. is one sh. regards persons & private customs. The application of this distinction is not always obvious, tho' apparently plain - Most Public Hs. regard  $\gamma$  concerns of  $\gamma$  whole state literally as  $\gamma$  H. of limitations. "grants. &c."

To show a St. enacted by no person shall go so or so, it is public. So Sts. prohibiting certain acts & inflicting certain penalties upon whomsoever offends vs. them, are plainly public. In these cases of distinction is sufficiently obvious. The St. being unlimited.

But there are cases in wh. Sts. relating to a particular class of men only are public, tho' relation is immediate. The rule of distinctions laid down by Lord Coke is, if a class of persons to whom a St. relates amt. to a genus of St. is then public, but if a class be merely a species, a Stat. is private. "Generale dicitur a genere, et speciale a specie".

If a class, to whom a St. relates immediately, be divisible into species, or other classes, it is a public St. but if a class is divisible, into species, or other classes <sup>into individuals</sup> only, it is private. If then a St. be divisible into parts, one of wh. applies to a class & other to a species, one part is public & other private.

Acts are deemed to be public acts, wh. judges will take notice of witht. being pleaded. Those wh. the judges will not take notice of witht. pleading are private Sts. or acts? A St. wh. relates to all subjects in a realm as a public one, tho' words of it are particular, yet if intent, is genl. a St. is a public one, & vice versa - 6 B. ac. 1031. 86. 4 Co. 78. a. b. 19.

2 Saunders. 154. 1 Lev. 86. La. Reg. 120. 381.

A St. relating to all mechanics is public, because they constitute a genus, but relating to all carpenters it is private, because they are one of a species wh. constitutes a genus of mechanics.

So a St. relating to all officers capable of serving a precept, is public, but one relating to all sheriffs is private, for in all these cases, a species is not composed of subordinate classes, but only resolvable into



individuals, & a St. relating to an individual, or individuals by whatever name they be called is a private St. But a St. authorizing all guardians to sell y<sup>e</sup> land of all minors w<sup>ill</sup> be public. 4 Bl. 76.

Every St. wh<sup>ich</sup> regards y<sup>e</sup> King is a public one, for every subject has an interest in y<sup>e</sup> King. For y<sup>e</sup> same reason every St. relating to y<sup>e</sup> President of y<sup>e</sup> U.S. or to y<sup>e</sup> state Governor, is a public St. tho<sup>ugh</sup> relating to one man, because it relates to him in his official capacity. 8 Co. 28. 138. 4 Co. 77.

Mac. ab. "Stat. Fr. - Hobbs. 227.

Hence a St. giving a forfeiture or Penalty to the King or state is public; because of y<sup>e</sup> forfeiture & all the concerns y<sup>e</sup> revenue are public, for these concern y<sup>e</sup> public. 14 Mod. 249. 613.

10 Co. 57. Plowd. 65.

A St. may be partly private & partly public 4 Bac. 630.

It is not unusual for y<sup>e</sup> Legislature to declare a St. public, in its nature private & by the Principles of the com. law private.

They doubtless have y<sup>e</sup> power & for y<sup>e</sup> sake of public convenience often exercise it - as it prevents y<sup>e</sup> necessity of counting upon & reciting the St. whenever action is brought upon it. For a private St. must be specially pleaded & proved as a matter of fact - whereas y<sup>e</sup> Ct. is bound "ex officio" to take notice of a public St. without its being pleaded.

14. II. Another Division of Sts. is yt. all Sts. are either declaratory of y<sup>e</sup> com. law or remedial of the same defects therein. 18 Bl. 86.

A declaratory act merely declares what the com. law is & always has been & makes no new law. But a remedial St. introduces a new law, either

by abridging the superfluities or by supplying a deficiency of  $\gamma$  com. law. as  $\gamma$  st. of "Limitations" & "Trusts" 1 Bk. 86. 4 Bk. 550.

To these may be added a distinct class of st. not taken notice of by any of  $\gamma$  books, being distinct from both  $\gamma$  former & are called explanatory st. ss 34 Hen. 8<sup>th</sup> &c. wh. explain a former st. & wh. are neither declaratory of  $\gamma$  com. law, nor remedial of such, but form a distinct class. There are however but few such; most st. with an exception of Penal st. being remedial. 1 Bos. & P. 141. 2

Bac. ab. st. i. 6. Lalk. 254. Garth. 396.

III. Another coordinate division is  $\gamma$  st. of Penal & Beneficial st. or penal & not penal. This last is sometimes called remedial. Beneficial is here used by Ld. Coke as contradistinguished from penal, & I think properly as there will then be no confusion. "Remedial" being before used as opposed to "declaratory".

Bac. i. 6. Cro. Jac. 414. 15.

A st. inflicting a penalty or a punishment of any kind is a penal st. & st. not inflicting such is "remedial".

The word "penalty" in its most extensive sense is synonymous with "punishment": but in its narrower sense or in common parlance, it means a forfeiture or pecuniary penalty. -

A stat. giving higher damages than are required by  $\gamma$  rules of natural justice, sd. seems to be penal, but they are not so treated in  $\gamma$  books - but 79. R. 2 as remedial. - Lalk. 212. Cro. Jac. 414. 1 Wils. 125. Com. dig. st. c. 1. 15.

All st. giving costs are considered penal & so construed, for they were unknown to  $\gamma$  com. law, & of  $\gamma$  st. created them, the first of wh. was Gloucester, 6 Edw. 1. - so considered them. Moreover they are given as a substitute for  $\gamma$  old com. law amendment, wh. tho. nominally used in judgments, is substantially abolished. Garth. 119. 122. Comb. 100. 4 Method. 7. Lalk. 205. 1 Bac. ab. 511. i. 9.



When  $\gamma$  Def. pays costs, it proceeds on  $\gamma$  suppo-  
sition, that he made a false claim - and when  $\gamma$   
Def. pays that he withheld from  $\gamma$  Def. his  
right. The old amendment was a penalty.

16. An action brought by an individual in his own right,  
to recover a penalty, is a civil action, tho'  $\gamma$  St.  
in wh. it is brought be a penal one. Thus  $\gamma$   
gives  $\pm 10$  to  $\gamma$  prosecutor for injury - an action  
to recover  $\gamma$  sum is civil. So of  $\gamma$  St. of Mass.  
& "Qui tam" actions upon it. Corp. 187. 191. 185.  
7 J.R. 257. 470. 752.

That wh. determines  $\gamma$  character of  $\gamma$  action is  
 $\gamma$  form of  $\gamma$  process; if it commence by writ or  
declaration it is civil - but if by indictment or  
information by wh.  $\gamma$  process is. it is crim-  
inal. And this is of great practical importance  
as it regards  $\gamma$  rule of evi. & amendments.

Civil actions are transitory, but criminal ones  
are local.

All Sts. are "affirmative" or "negative" - This must  
be determined by  $\gamma$  phraseology & practically is  
of no importance, any more than to say, all  
Sts. that are in red ink or black. 103 R. 89. Mac K.  
All actions between party & party are civil; tho-  
for  $\gamma$  recovery of a penalty it is as much so as  
an action for money had & received.

In Eng. every St. commences its operation, from  
 $\gamma$  commencement of  $\gamma$  session of  $\gamma$  Legislature in  
wh. it is enacted, unless some other time is pre-  
scribed for its commencement. by  $\gamma$  act itself.

Sel. 310. Hob. 309. 222. L.R. 371. This arises out of  $\gamma$  legal fiction,  
th.  $\gamma$  session continues but one day, as a  $\gamma$  t. & Jus-  
tice. But this Rule must often operate retroac-  
tively.

It has been holden th. two Sts. enacted in  $\gamma$  same

session will both be repealed with respect to y repug-  
nancy, But there is a late decision wh. is, "yt. y latter,  
in point of time, will repeal y former" *pro tanto* &  
this I take to be y better opinion. 6 Mod. 287.

13 ex. 678. H. 23. & C.

This last rule is genly. adopted in y<sup>s</sup>. country & it is  
customary for Congress to fix a time when a new  
St. shall commence its operation.

Before entering upon y construction of Sts. P. D. ob-  
serve, with regard to y character of y two genl.  
divisions of Municipal Law, yt. y Stat. Law is a  
mere methodical collection of positive rules too  
limited to meet a vast variety of cases of y Munic<sup>l</sup> Law.  
On y contrary y com. law is a concatenation of princi-  
ples founded in justice & so extensive as to embrace  
all y duties & rights of perfect obligation.

It may be sd. to be a system of Ethics, embracing  
all y duties wh. are y rights of perfect obligation.  
Hence arises y vast superiority of y com. law, so  
highly deserving & surpassing y *praeceptivicks* yt.  
has been pronounced in its favour.

The construction of Statutes. is yt. process by wh.  
we discover y will or intention of y Legislative. 1 Bos. & C. 370.

In y construction of Sts. especially remedial ones there are  
three points principally to be considered.

1<sup>st</sup> What y old law was at y enactment.

2<sup>d</sup> The mischief or evil (i.e.) wh. y old law did not  
provide for. 3<sup>d</sup> The remedy applied to prevent a  
cure y mischief.

Hence y construction must always  
suppress y mischief & advance the remedy. 3 Bos. & C. 103 H. 87.

The object of this rule then is to ascertain from y  
old law, y mischief for wh. y remedy is intended  
to provide - Thus by St. 13 Eliz. Leases made by  
Bishops for more than 21 y<sup>s</sup>. are void.



To find out  $\gamma$  meaning of this St. & indeed of any other  $\gamma$ t. is doubtful, a logical mind is led spontaneously to enquire, What was the old Law? It enabled Bishops to make leases for an indefinite time - Then, what was the mischief in this? The impoverishment of their successors - Such leases have been adjudged good, giving  $\gamma$  Bishops continuance in his see & much valuable on his death or removal - The remedy then  $\gamma$  intended to prevent this impoverishment, by long leases.

The two first are merely important as means of construction; for if  $\gamma$  remedy is ascertained  $\gamma$  law is ascertained. - St. law is  $\gamma$  will of  $\gamma$  Legislature in writing - com. law is nothing else than Sts. worn out in time. 10 Blk. 87.

The rules of minute interpretation be given in 13 Blk. app. ily as well to St. as to com. law. 13 Blk. 59, 61.

Penal Sts. must be construed strictly & according to their literal import & so rigidly has this rule, prohibiting  $\gamma$  extending  $\gamma$  construction of penal Sts. been observed,  $\gamma$ t. it has sometimes been carried to a

Leach's ludicrous extent. The St. Ed. 6 takes away clergy from a man stealing "horses." - Stealing a "horse" is adjudged not within  $\gamma$  St. - So stealing a bitch not within  $\gamma$  St. making "dog-stealing" felony. 13 Blk. 88; 2 Co. 7. 170. This is merely from a benignity of  $\gamma$  law which accords from being banished when not within  $\gamma$  letter. The true meaning of  $\gamma$  rule then is,  $\gamma$ t.  $\gamma$  party accused, Penal Sts. are to be construed strictly, but when for him, equitably, & liberally (i.e.)  $\gamma$  person accused is not to be adjudged guilty of  $\gamma$  penalty when within  $\gamma$  reason & spirit of  $\gamma$  law, unless also clearly within  $\gamma$  letter. But tho' he is strictly within  $\gamma$  letter he is not to be adjudged within  $\gamma$  penalty unless also

within y reason & spirit -

Hence y Spirit may be compelled to take a party out of y St. who is within y "letter". but not to bring within y penalty, a person, who is not within y letter. If he is not within y letter, he is not within y penalty. 4 Bk. 193. P. 465.

1 Hawk. pl. cr. tab. Pen. St. U.S. 131. 135. 13 ac. ab. St. 1. 5. 1. 9.

Hence if a St. enacts yt. whoever does so & so, shall be guilty of felony. here it is clear yt. infants & idiots & lunatics wd. not be convicted for the within y letter, they are not within y spirit.

1 Bk. 88.

In genl. any universality of expression in a penal St. will not include those unless they are specially named, who by reason of any incapacity at con. law are exempt from such punishment; for any act not before forbidden at con. law, for wh. y St. provides a corporal punishment, does not extend to infants, unless expressly named, as "whoever mutes a nuisance on a highway &c. shall be whipped". Infants are not within it unless named in words expressly - contra Ld. Kingon thinks it an arbitrary principle or rather distinction.

1 Hawk. ch. 64. sec. 35.

It is not however to be understood that y intention of y Legislature is to be disregarded in y construction of penal Sts. as vs. y party accused - To make any distinction appears vs. y nature of things.

The truth is, y intention of y Legislature - when apparent ought always to govern, & this wd. not be a sanguinary construction, as some have stated, but a just & legal interpretation. 4 B. R. 3. When Ld. Kingon strongly animadverts on y practice. P. 46. 86.



This rule of strict construction has not however been uniformly acquiesced in; for there are cases, in wh. y. Eng. Cts. have gone so far, as to bring a person not within y. letter, within y. spirit, as in y. case of a serf. who was made guilty of petit treason, for killing y. master's wife, when y. St. only made it petit treason for killing y. master, & on y. ground y. will of y. Legislature, wh. is y. law, wd. be otherwise evaded.

In conformity to this rule of strict construction, it has been settled, that if y. repetition of an offence, increases augmented punishment. for y. 2<sup>d</sup> offence, unless he has before y. commission of y. 2<sup>d</sup> offence, been tried legally & convicted of y. first; for there is otherwise no legal process, (i. e.) no record of judgment vs. him wh. is y. only proof in this case. 1 Hawk. 168. Hale's Pl. cro.

2 Bulst. 349. - Bac. St. i. 9.

Note. 2 - these cases, y. accused must be convicted of y. first even before y. 2<sup>d</sup> is convicted, or he will not be subjected to y. increased punishment. 1 Hawk. 168. 1. Hale P. C. 324. 570. 685. This is a strange instance of the 'benignity' of construction of penal Sts. The first punishment, (say y. Judges) was intended as a statutory discipline, & y. offender ought not to incur the augmented punishment, till he has reaped the benefit of y. first lesson. Bac. ab. St. 3. q. 9.

One may be indicted for several offences in y. same indictment or presentment. Reak. R. 57.

It has been held in y. Cts. of Com. t. yt. when y. same penalty has been repeatedly incurred, by a continuance of y. offence, as for a nuisance, neglect to prove a will &c. only one penalty can be sued for & recovered at the same time. The Cts.

Proceeding upon y ground of y punishment, for y first offence being a warning to abstain from a repetition, he shd. have suffered y whole of yt. before he ca. be prosecuted for y others. 1 Root. 52.

L. & C. contra. & it is certainly difft. from y Eng. Rule.

There are some cases in wh. penal Sts. have been extended by construction, but they are clearly distinguished from Law.

The Penal Laws of every sovereign State are strictly local, whereas Remedial Laws are transitory; so yt. y penal laws of one country can. never be enforced or noticed in another, so as to affect y rights of citizens in y latter. A nation can't punish faults committed out of its territories.

This is a principle of public Law, for there is no such thing as a community of criminal jurisdiction in separate states. 1 Hen. B. 123. 1 T.R. 733.

Feeling 38

Vattel's Law. Nat. Book 1. ch. 19. sec. 238.

The Penal laws of every country extend to all aliens within yt. country, & if they commit crimes there, they must be tried by y laws; for they owe a temporary allegiance to them, as long as they reside within their jurisdiction. 1 21 East. R. p. 115.

As a man can't be punished corporally for any offence, attended with yt. punishment in one State; in a difft. state from yt. wherein y offence was committed, so neither can he be punished for any other offence. 2 Johns. Rep. 477. 79.

But we may enforce any right strictly civil, & not in its nature local, as well in one state as in another, regardless where y cause of action may have arisen. Thus if A. give B. a bond in Court. it may be recovered as well in Rome or London as in Court. & so of Flanders & even



Battery, as far as regards  $\gamma$  civil remedy, & indeed any other cause of action, wh. is in its nature transitory.

It has however been determined in Court. & App. yt. if goods be stolen in one state & transported by  $\gamma$  thief into another, he may be tried & punished in  $\gamma$  latter, upon  $\gamma$  principle yt. he repeats  $\gamma$  theft in every stage of his progress. This decision in 19 Mass. T.R. 110. is, to say  $\gamma$  best of it, a very extraordinary one.

This point has however been settled  $\gamma$  other way in N.Y. & by J. Patterson in  $\gamma$  N. J. Ct. in  $\gamma$  case of  $\gamma$  M. T. vs. Page, in 2 John 477.9. It was decided yt. a person apprehended in  $\gamma$  State of N. Y. in possession of a horse, wh. he had stolen in Vermont. sh. not be convicted in N.Y. This was the case of  $\gamma$  People vs. Gardner - & these authorities I conceive to be demonstrable of  $\gamma$  Law.

It has been supposed on this principle in  $\gamma$  Eng. practice, yt. when a felony has been committed in diff. countries, it may be tried & punished in either. But  $\gamma$  analogy can't be extended to 2 diff. or separate governments, governed by diff. laws, & under diff. heads, like any 2 of  $\gamma$  U. States; For in diff. countries of Eng.  $\gamma$  same punishments are inflicted under  $\gamma$  same supreme Jurisdiction.

Further it is impossible for a Ct. to know judicially whether what we call a theft, is an offence at all in a neighboring state. The man might have come honestly by  $\gamma$  goods, & bringing them into  $\gamma$  state is certainly no offence in itself.

Moreover what we call larceny, might in some places, as it was in Sparta, under certain cir-

circumstances be no offence, & what is still worse a trial & acquittal, or conviction, is no bar to an indictment in another right.

## Remedial or Beneficial Statutes.

Remedial or Beneficial Sts. are to be construed liberally or equitably to effect of intention of Leg. islatum. Cases not within letter have been adjudged within spirit & vice versa for this rule operates both ways. Ex. the St. of Colo. St. gives a remedy vs. exco<sup>r</sup> in certain cases but says not a word of Admin<sup>n</sup>, here, & Cts. have enlarged of St. & determined yt. Administrators are liable when Exco<sup>r</sup>ed. be. So on y other hand of spirit may not restrain of letter. Thus St. 32 Hen. 8. enacts yt. "all persons" may devise lands - & Cts. have determined yt. of word "all persons" did not include Idiots, feme coverts, infants &c. & St. 34 Hen. 8 sanctioned their decision. 3 Co. 7. 1 do. 123. 11 do. 71. 3 Blk. 430-1. 4 In 354. 100. 300. Poi. do. 140. Prae. ab. "Kat." i. o. 7.

Under this genl. rule, clauses, sentences, single words, when used in a St., are construed by Cts. in a diff. sense from what they usually express; this may be illustrated by a whole class of cases arising under of words "void & voidable" - of distinction of primary importance, as no two words of Law, have occasioned a greater latitude of discussion.

"Void": is a mere nullity - can't be ratified & is as if it had never been, & 3<sup>d</sup> persons may take advantage of it. 1 Blk 87. 3 Co. 59. 6. 50. Cro. Eliz. 141

2 Rep. 413. Cro. Eliz. 207. 10. Co. 59. a. 2 Rep. 506. 720. 310.

"Voidable" stands good till avoided & no one can take advantage of it, except the parties or their representatives. The true distinction is, if an act



a transaction is declared by Stat. to be "void" it is holden to be strictly void; if y mischief intended to be prevented, &c. be let in by construing the act only "voidable" - but on y contrary, if y mischief wd. not be let in, by construing y word "void" as "voidable" it may be & often is so construed.

To exemplify this distinction. The St. of Cal. to which there is a similar one in most of y States, provides yt. all conveyances, by debtors to defraud bona fide creditors, shall be absolutely void. Here y construction must be literally & strictly so, or y St. is a void letter; for y only possible way in wh. y end of y St. can be answered, is to treat y conveyance as if it had never been. Were it construed as only "voidable" y mischief wd. be let in & further as moreover 3d persons co. never take advantage of it.

Terms merely permissive in St. Laws are often construed as imperative & it is a genl. rule, when a St. enables, a Ct. to do a matter of justice between parties, they are bound to do it, in all cases falling within y St. & y enabling words have an imperative effect. Thus y 889 W. & M. enact yt. Cts. may award costs to y deft. in certain criminal cases. In such cases y Cts. are bound to do so. 2. Tra. 1131. 5 B.R. 528. 2 Hask. 263. Prac. St. i. 1.

When a St. directs y doing of a thing for y sake of justice or y public good y word "may" is positive. But this rule does not extend to executive officers genly. in relation to y official acts, wh. a St. enables them to do.

Goode, Mc. Kane of Pa. made a correct distinction. The constitution of y State enacts yt. y Governor on y representation of both houses of y Legislature, may remove y whole bench of Judges, or any one of them.

"When thus addressed, he refused; The Legislative Envo. J 80. 2.  
 and to convince him that I would "may" in an act of the  
 meant "must", but his answer<sup>was</sup> <sup>that</sup> it meant <sup>the</sup> <sup>palace</sup>  
 "won't" when addressed to a Governor. 2 Hawk. 263.  
 374.5.

However I st. the "beneficial" taking away a com.  
 law remedy is construed strictly; for such abridges  
 I com. law rights of citizens or subjects. Thus it has  
 been held at com. law y. action of Gover, when  
 concurrent with Treaspass is not barred by st.

10. Mod. 282. Bac. ab. i. 6.

There is however one class of st. falling within y.  
 last distinction st. are construed liberally, viz.  
 I st. of limitations, st. tho they take away I com.  
 law remedy, are not so much for taking away  
 right of one party as for quieting I long undis-  
 turbed possession of another & ergo are aptly  
 called I st. of repose. 1 Salk. 471. 11 Q. R. 308.

Runnington in Egert. 58.

Words of an "explanatory" st. can never be ex-  
 tended by construction, they must be taken in  
 their strict sense; for y office of an explana-  
 tory st. is to give I meaning of a rule & is it-  
 self an act of construction, & y terms might  
 be indefinitely extended. Bath. 398. Salk. 574.

Bac. st. i. 6.

In Stats. y. are partly penal & partly remedial  
 I two Rules of construction, have their respective  
 application, Thus in y st. of Fraudulent convey<sup>s</sup>,  
 st. has a double aspect, one part is to set aside  
 I fraudulent act, & thus for "Remedial" st. wd. re-  
 ceive a liberal construction, but y. part wh. inflicts  
 I penalty is "Penal" & must be construed strictly, as might  
 all st. acting vs. I offender. 1 Blk. 88.

Blowden. 57. Bac. ab. stat. i. 6.

2 Co. 82.



The diff. parts of a St. are always to be construed, so that y whole may if possible take some effect - same in contracts. Hence it is always objectionable y. any part is rendered nugatory, to wh. it is possible to give an effect. y. if one mode of construction wd. make a word nugatory, & another give effect to it.

But when words are synonymous, either construction may remain to be made, unless repugnant to y body of y Stat. for repugnancies are if possible to be reconciled, & if inconsiderable, y latter part repeals y former "pro tanto".

1 Co. 49. 131k. 49.

And a saying y. annihilated y whole body of y St. is utterly void. Court will never suffer a part to destroy y whole, or charge y Legislature with such an absurdity, but y purview of a St. may be qualified or restrained by a "saving".

1 Inst. 22. 131k. 431. 38.

But if a proviso in a Stat. is contrary to the purview of y Stat. y proviso is good, & not y purview - because such speaks y latter <sup>intention</sup> of y Legislature.

The Rules of construction of Sts. are y same in Eng. as at law. It is a very erroneous idea y. Eq. will give a construction, diff. from a Ct. of Law. True they may differ in construction as well as two Cts. of Law. Two Cts. of Law may, but the principles are & must be y same in both, for y Legislature can't mean diff. in Eq. & Law. The remedy may differ, y proceedings always differ, but y construction of y Stat. & of contracts is y same in both.

1 Inst. 22. 1 Blackstone 431. 38.

q<sup>d</sup> stat. contrary to natural Eq. is void "jura nat-  
tura sunt immutabilia".

## Repeal of Laws.

All Law, whether Stat. or Com. is repealable and this must necessarily be y case. For y power of making a Law necessarily involves y<sup>t</sup>. of repealing it. But y Legislatures of y several States cannot repeal any constitu-  
tional provision.

Whenever y con law & Stat. differ, y con. law is abrogated or repealed by such, wh. is y intention of y legislature, & not on y ground of its being higher authority as erroneously supposed - & a Stat. is of course always considered of later date than y unwritten law.

So if 2 Sts. differ, y elder is repealed & still further if two parts of y same St. are repugnant, the latter part shall stand alone & repeal y other "pro tanto". Bac. 698. 641. Stat. d. g.

5, Mod. 287. 13k. 89. Co. Lit. 111. 15.

And as every St. is repealable, a clause in any Stat. y<sup>t</sup>. it shall not be repealed is void. So an act, enacting y<sup>t</sup>. it shall be repealed only by a majority of 2/3 or 2/5 is void. For a majority can always repeal a former St. Moreover such clauses are in derogation of y authority of a subsequent Legislature. And a prior Legislature can bind a subseqt. one, except by compacts, wh. are not properly legislative "acts" but "conventions".

Hence it is a genl. rule y<sup>t</sup>. all acts in derogation of y power of a subseqt. Legislature are void.

11 Co. 52. Bac. H. d. 641. 13k. 90.



This principle may be brought to bear on some of  
 y<sup>e</sup> Constitutions of these States, wh. a majority  
 of y<sup>e</sup> people always have a right to alter. Indeed  
 y<sup>e</sup> statement of y<sup>e</sup> proposition carries with it con-  
 viction & is self-evident; for they can alter any  
 legislative provision by a bare majority of those  
 who compose y<sup>e</sup> legislature.

But y<sup>e</sup> Constitution of y<sup>e</sup> U. S. is a compact be-  
 tween distinct sovereign States, & is a matter of  
 convention attainable only in y<sup>e</sup> manner prescri-  
 bed.

The law never favours y<sup>e</sup> repeal of a former law by  
 implication. Where 2 Sts. are apparently at var-  
 rance, Ct. & Justice are so to construe them, yt.  
 both may stand if possible; & y<sup>e</sup> repugnancy  
 must be clear, to repeal a former Stat. For it  
 is to be presumed, that if y<sup>e</sup> Legislature intend-  
 ed to repeal y<sup>e</sup> former, they wd. have express-  
 ed yt. intention. 11 Co. 67. Bac. ab. Stat. &

24. It is laid down in y<sup>e</sup> books, that an affirmative  
 Stat. does not repeal y<sup>e</sup> Com. law. Co. Lit. 111.5.

\*

This is not satisfactory in any means, & per-  
 fectly unmeaning, for a St. couched in affir-  
 mative terms, may or may not repeal y<sup>e</sup> com. law.

If it is inconsistent with it, it repeals it, & c.  
 it does not. This opinion is corroborated by many  
 cases in wh. it is confessedly repealed. The same  
 may be said of negative Stals. & Bac. H. g.\*

Polk. 59. Construing action upon St. C.

The above has arisen out of yt. Stat. division of  
 Sts. before mentioned, wh. to say the best of it, is  
 senseless.

When it gives a remedy in any case in wh. there was a subsisting remedy at y com. law, & does not abrogate y com. law expressly or implicitly, there will be two concurrent remedies, the Stat. being called "cumulative".

2 B. & W. 802. s. 1. trans. 19. 20. St. L.

If a Stat. inflict a higher or lower penalty a punishment than is inflicted by an older St. the older is of course repealed; for it is not to be presumed yt. y Legislature do intend to provide two distinct punishments for y same offence.

Mac. ab. St. R.

1 B. & W. 201. 202. Leach's tr. law. 252.

If a Penal Stat. inflict a lower punishment than is inflicted by y com. law for a given offence, y com. law is repealed by y Stat. & the lower punishment can only be inflicted; for clearly when y Legislature intends a penalty they mean to repeal a higher one.

But if a Stat. inflict a higher punishment than com. law for y same offence; y com. law is not abrogated, y Stat. punishment being only "cumulative"; & y offence may be punished under either.

The Stat. of Eliz. furnishes an example of this, wh. punishes perjury more severely than y com. law, & yet y prosecutor may effect either; - But it may be asked, is there not as high evidence to repeal y old law in y last case as in y other? I confess there is & that y diversity is founded altogether on y benignity with which Penal laws are constructed - 3 B. & W. 130. 10 Mod. 227. Mac. St. R.

4 B. & W. 2026. 4 B. & W. 138.

Observe yt. y marked diff. between Sts. inflicting a "higher" or "lower" penalty than was done by a former St. or by com. law whether higher or lower, is yt. y former St. is repealed, but at com. law there is a diff. so yt. if y St. penalty



is lower than that at com. law, it repeals it, if higher it is not repealed.

25. It is laid down in some of y books yt. an affirmative Stat. does not repeal a prior affirmative St. This is unintelligible & to me appears an arbitrary & unmeaning distinction, wh. I have never seen satisfactorily explained. The explanation is attempted in 2 Show. 20. wh. only confounds confusion.

The true criterion, whether one repeal y other, or not is whether y latter is inconsistent with y former, for if it is inconsistent with it, y latter repeals y former, tho affirmative. 13th. 89.

But these Rules relating to repeals founded in repugnancy apply only to constructive repeals & not to express clauses; for where there is an express repealing clause there can be no question.

When y repealing St. is itself repealed, the original St. is "ipso facto" revived. On y other hand, if y St. wh. has been repealed, is revived, the repealing St. is void, so far as it is repugnant to y first "pro tanto". The repealing St. becomes void by y reestablishment of y repealed St. by implication; for in either case y intention of y Legislature is evinced.  
13th. 90. 3d. 8. 2.

If one St. is grafted on another to y better execution of y former, y repeal of y former virtually repeals y others.

So if a St. be revived, the explanatory acts attendant upon it are revived with it. And all y Sts. "pari materia" are to be taken together.

as if founded on one Law. So when an action founded on a former Stat. is given in a new case, every thing annexed to y action is also given.

When one St. is expressly repealed by another, wh. makes diff. provisions on y same subject & a provision for its own continuation for a limited time, y former St. does not revive after y lapse of yt. time, unless it was specially so by y latter. 3 East 205. For y express clause shows yt. y repeal was not to be limited to y duration of y other provisions.

When a Stat. has been repealed by 3 or any 26. number of repealing Acts - & only 2 of y repealing Acts are repealed, y 3d continues in force & repeals y original Stat. 4 Bac. Tit. "St. 4 Just. 43.

If a St. yt. has been repealed is revived, y repealing act, if merely a repealing one, becomes void "in toto", but if more, it is only void "pro tanto" for it is impossible yt. y repealing clause shd. remain in force. 4 Bac. St. 2.

When a St. is repealed, all acts done under it, before y repeal, are good & lawful; for y repealing of laws merely make them cease from y time of y repeal. But it is laid down in some of y Eng. books, yt. if a St. is declared void, all acts done under it are absolutely null & void.

I apprehend yt. this is wholly inadmissible & will not bear a moments investigation.

It is too destructive of y peace & policy of y St. to be tolerated - in fact it wd. be punishing an obedience to y laws. ib. ant.



It is a genl. Rule yt. a St. neither can nor ought to have a "retroactive" operation, & indeed such is forbidden by y<sup>e</sup> Rules of y<sup>e</sup> Principal Laws - for y<sup>e</sup> Rule wh. forms a law is to be prescribed. 103 Hk. 46.

Hence if a penal st. after having been violated & before judgment, is given vs. y<sup>e</sup> offender, is repealed & a new st. is made on y<sup>e</sup> same subject, y<sup>e</sup> offender is not punished punishable under either, unless y<sup>e</sup> former is expressly continued in force, as to all acts & offences committed before it was repealed, by an express clause to yt. purpose. For y<sup>e</sup> offender can't be sentenced under y<sup>e</sup> "first" - for by y<sup>e</sup> supposition there is no such law in eff. nor can the latter st. affect him, for if it did, not being in existence at y<sup>e</sup> time y<sup>e</sup> offence was committed, it wd. operate "ex post facto" wh. is forbidden by y<sup>e</sup> Constitution of y<sup>e</sup> U. S.

10 Hk. Rep. 451. 1 Hask. 169. Bac. 636. "H." 83.

There was a case in N. Y. where a clerk in a public office, was indicted for frequently robbing a mail, but after y<sup>e</sup> indictment & before y<sup>e</sup> trial, there was a law passed altering it as it stood at y<sup>e</sup> time, when y<sup>e</sup> offence was committed & he thereby escaped punishment. entirely.

This Rule is founded on y<sup>e</sup> broad principles of criminal Law. Hence it has become common to insert in repealing sts. yt. y<sup>e</sup> repealed st. shall continue in force as to all acts committed before y<sup>e</sup> new one was enacted.

But a Stat. tho. not essentially "retroactive" in its provisions may become so indirectly, & its retrospect can't be prevented. As if a court is made

to do an act, lawful at y time, but wh. before the time of performance becomes unlawful by Stat. the cont. is annulled, for y covenantee can never be compelled to do an unlawful act, & this is perfectly consistent with y retroactive prohibitions.

Thus, if a cont. shd. be made to import certain commodities & before y time of importation arises, an embargo or a mere non-importation act, or a declaration of war shd. render y performance unlawful; y cont. wd. be annulled. It amts. to y same as inevitable accident.

1 Lalk. 198. 1 Poo on Cont 166. 6. Ld. R. 217. 21. 1352. 89 Mod. 51. 374. 2 D. 18. 218. 1 Fomb. 211 - see Cont. 50. 140)

But here it is to be observed, yt. y St. in terms is prospective - a future illegal act; for y rule is not yt. y parties shall not be bound by y performance, when y act was lawful, but yt. y performance can't be compelled.

On y other hand, if one conts. not to do an act wh. a subseqt. act makes it his duty to do, the contract is annulled. & if one shd. contr. to serve another & not to depart without his permission, & is by law required to enter y army.

Here y Law annuls y contract. & thus every cont. must be made subject to this tacit condition.

Lalk. 198.

If however one conts. to do an unlawful act, a subseqt. St. making yt. act lawful, does not annul y contract. for there is no inconsistency in obeying both.

If a cont. illegal by Stat. is made while y St. is in force, a subseqt. repeal of y St. can't give validity to such prior cont., nor can it make it good.



28. Instances of this kind occur under y "stamp act" making all contr. witht. stamps void, tho, y. l. was repealed in 1801. Yet all made witht. stamps while y act was in force, were as much void after y repeal as before; for we are to look at y state of y circumstances when y contr. was made. 1 Hen. Blk. 65.

If complete performance of a lawful act. be made illegal by a subseqt. St. yet if it can be performed in part legally a performance of y. part will be enforced in Eq. & I trust in a Ct. of law, if y. Ct. Es. except a remedy to y. case. Thus when a Lord & Chapter covenanted to make a lease for 90 yrs. & before y lease was made, leases for a longer time than 90 yrs. were made void by St. Then y contr. obliged them to make a lease for 90 yrs. \*

This is what is sometimes called performance "cy pres" - as near as may be. 2 H. Blk. 163. 581.

\* "Parr. Ch. 51" Rhod. 255. 2 Hen. Blk. 581. 163. 1 Poth. 218. 211. 3 Bro. P. C. 101. 2 J. R. 255. 2 P. in Cont. 31. 12. 458. 450. Cont. 52

So also if a complete or literal performance is prevented by act of God, y rule is y same & performance may be compelled "cy pres" - Thus if a man covt. to convey a house & lot & y house is burnt by lightning; he may be compelled to convey y lot but y other party is not bound to accept it. Eq. cas. 18. 1 Dow. C. 448.

Art. 1. sec. 10. of y Const. of y U. S. forbids y state Legislatures making any law impairing y obligations of contracts. i.e. "Ex post facto" laws. Now it has been a question whether a Stat. making a contract void, conflicts with this section of y Constitution. I apprehend y article has no bearing on such. For

if a court to so an act afterwards made unlawful, were not annulled, & consequence sh. be y<sup>t</sup>. individuals by contracting with foreigners might curtail y<sup>e</sup> power of y<sup>e</sup> Legislature. & moreover I conceive that this section applies to those acts wh. directly make void contracts between individuals & not to those whose annulling, prohibitory effect, is merely consequential & y<sup>t</sup>. an act of y<sup>e</sup> nation, whose object is y<sup>e</sup> public good, is to be void merely because any individual may suffer, is absurd.

That part of y<sup>e</sup> Constitution relative to "ex post facto" laws has no concern with this; for they are penal retroactive laws. Under this head it may be observed, y<sup>t</sup>. insolvent laws under our States Legislature may be made so far as to discharge y<sup>e</sup> person of y<sup>e</sup> debtor; but any provisions discharging his future acquisitions in property are void. This was determined in y<sup>e</sup> Supr. Ct. of y<sup>e</sup> U. S.

4. Wheat. 122. 209. 6 do. 131. 3 Ball. 386. 291.

It is laid down y<sup>t</sup>. a Lt. requiring that to be done wh. is impossible, is void - 13th. 91. Likewise it has been sh. by Lord Coke, Hobbs & indeed Black. y<sup>t</sup>. a Lt. contrary to reason or divine law is void. 8 Co. 118. Keble. 84. 9. But this I apprehend is indefensible, as there is nothing in wh. men more widely differ, than in their opinions of the Divine Law.

29.

If a Legislature choose to make an unreasonable law, no Judge can set up his Court & overrule such. But I sh. lay down y<sup>e</sup> rule thus, - If y<sup>e</sup> collateral consequences are demonstrably unjust, y<sup>e</sup> Ct. may avoid same if they can by giving a reasonable construction to y<sup>e</sup> Rule, but if y<sup>e</sup> inten-



tion is plain, - they must so administer or leave  
bench. 1 Blk. 41. 91. 1 Fontb. 22.

30. And <sup>whether</sup> a St. opposed to y Constitution of y Land  
was void, or sh. be so declared by Cts. of Justice,  
the question for some time, is a difficult quest.

Cts. of Justice & all Cts. of Justice have a right to  
decide upon y constitutionality of cases.

see Federalist No. 78.

The Sup. Ct. of y U.S. may declare cases void  
if contrary to y Constitution.

The Constitution is part of y Municipal Law of  
y Land, & paramount to all legislative pro-  
visions, & as Cts. may declare a later St. to  
repeal a former repugnant one, void, so  
may they declare a Stat. void sh. is repugnant  
to y Constitution. There is no more difficulty in  
y one case than in y other. Even a jury may decide  
upon it under y direction of y Ct.

This question has been repeatedly argued & decid-  
ed in y Sup. Ct. U.S. to sh. all questions of  
the Constitution may be carried. Federalist No. 78.

31. It has been questioned how far a St. author-  
izing a Ct. of jurisdiction in a particular case  
ousts y jurisdiction of y anciently es-  
tablished Cts. of genl. jurisdiction? The answer is,  
if a St. make a new law concerning an old  
office & appoints particular Cts. to execute it,  
y jurisdiction of a Ct. of genl. criminal jurisdic-  
tion is not excluded by it, but there is a con-  
current jurisdiction, for y jurisd- of Cts. of genl.  
jurisdiction can't be ousted by implication.

The same may be observed of our State Cts. in  
this country. If a Stat. enacts yt. all ancient

crimes of a particular nature shall be taken cognizance of by a newly established Ct. This wd. not exclude y jurisdiction of y corresponding higher Cts. in this country. The St. in these cases only provides yt. they shall be tried by a particular Ct. & does not say that no other Ct. shall try them.

But if a St. creates a new offence & establishes a new jurisdiction for its trial. it is not perfectly settled, whether y jurisdiction of a Ct. of genl. jurisdiction is excluded by it or not. The better opinion seems to be yt. it is excluded in the last case; for here there is no ancient jurisdiction to be ousted by implication. 1 Hawk 29. 114

1 Mod. 415. 2 Burr. 1042. 9 Co. 118. Lalk. 564.

This opinion is confirmed by all y books.

Coasp. 524.

If a special authority is given to certain persons, affecting y property or rights of individuals, yt. authority must be strictly pursued, & must appear on y face of y proceedings, or y proceedings will be void, & y party acting under it, Trespasers. 1 Sid. 196. 2 Hale's Pl. c. 2. 5.

Co. pac. 643.

If a St. enable a certain body of men, not incorporated, to do certain acts by a majority, & constitutes a certain number of them a quorum, <sup>a maj. of quorum</sup> not amounting to a majority of y whole, will not bind them. (Coasp. 25.)

The principle seems to be, that as these bodies are mere creatures of y St. they have no other powers than those specially given them, & necessarily incident to them. This is not applicable to corporations. (Coasp. 26) 3 T.R. 594. - 4 do. 810 & 22.

10 Co. 30. Hob. 211. Prac. ab. St. 9.

1 Mod. 13.

Authority of a private nature conferred by St. on 1 or 2 private individuals is joint & not several



unless otherwise expressed, & upon y death of one, it does not survive to y other. 1 Root 67. But if y authority be of a public nature, it is joint and several, so yt. on y death of one y authority will survive to y other. *Stoa. 117. Co. Lit. 181.*

This contemplates ministerial acts only & not judicial, unless expressly named. *Stu. 117. Co. Lit. 181.*

If a power of a public nature is given to several, the act of a majority of y whole number, all being present, in y exercise of y power, is y act of all. The majority however have no power to act secretly. But if y others are notified, their act will be binding, except y wilful absence of one, might defeat any measure. *35 R. 592. 1 Bos. & Pul. 229. Co. Lit. 181. b. 2 Bover. 1017. 1020.*

These Rules do not apply to bodies politic or corporations, in wh. a majority of all present bind y whole, provided there be nothing vs. at in y charter of incorporation & y meeting be legal, all being duly summoned. The number present constitute "pro re nata" the corporation. *See. If y meeting is regularly convened it is sufft. 2 Atk. 212.*

*1 Bos. & Pul. 236.*

Note. The word "void" in a st. is often construed "voidable" & often taken in its strict sense.

It has been sd. yt. "void" with more might be construed "voidable". seems if y words "to all intents" were added. This is not y criterion; for void "to all intents" has been construed "voidable".

Rule. If y subject of y stat. wd. be defeated, by adjoining a act voidable only it must be adjudged "void". *See. It may be adjudged "voidable". 13 R. 87.*

Several Sts. relating to y same subject, are all to be considered, unless containing one.

Rules of y construction of Sts. are the same in Eq. as in law, y mode of enforcing y law is diff't.

### Of Pleading Sts. or the Mode of prosecuting them.

The Books on this subject are more confused than any other branch of Pleading. In some cases they are irreconcilable, arising in a great measure from looseness or inaccuracy of language, & from a promiscuous use of y phrases "Pleading", "Contenting upon" & "reciting" as Sts. are specifically diff't. & totally distinct.

Merely Pleading a St. consists in nothing more than alleging y facts, st. being y case within it, & for this purpose y St. need not be named or even referred to. Thus to plead y St. limitations in assumpsit, Deft. merely says "Non assumpsit infra sex annos" & to plead y St. "grades &c." Deft. does not refer to y St. but merely says that there is no note or memorandum in writing signed by him, or not his act in writing &c.  
See "Form" sec. Lo. De. 11. - 221.

Counting upon a St. consists in an express reference to it, by y words "in virtue of y St." or "vs. y form & effect of y St." in such cases &c. & he who pleads a St. also, sometimes counts upon it, without being required, for they are distinct acts. \* contra formam statuti.

Reciting a St. differs from both y former & consists, as y name imports, in quoting the



Stat. or its contents, True a St. is sometimes pleaded by reciting it together in connexion with a statement of facts which bring them within it; But pleading a St. does not necessarily imply a reference to it, or recital of it.

It is a genl. Rule, yt. Judges are bound "ex-officio" to take notice of a public St. tho- they are not set out in a pleading, For if a facts are sufficiently stated, the Ct. taking Judicial notice of a St. will apply it to them, if they come within it. And if a public St. be denied, it need not be proved, for Judges are to know it Judicially.

But if a private St. Judges are not bound to take notice of it "ex-officio" & can know nothing of them Judicially, unless pleaded & recited; for it is a new matter of fact, a private "munimenta" of right, & sh. Judges are no more presumed Officially to know, than of the existence of a deed, note or any specialty, and of course no advantage can be taken of it, unless specially pleaded; & such may be denied by a plea "nul tid record" in sh. case of party must prove it. 4 Co. 76.

4 Co. 76 Cro. Eliz. 236. 1 Bac. 28.

To take advantage of a private St. it is necessary at com. law to plead & recite it, & if an action is birt, or such, it must be set out in a Decln. It must be sued upon as a specialty; for if it is not set out, no cause of action appears on a Declaration.

10 Co. 37. 2 Mod. 37. 2 Roll. 366.

But a public St. when required, as it sometimes is, when used by way of defence, need never be recited, tho- they are sometimes counted upon.

Cro. Eliz. 236. Hawk. ch. 25 sec 100. 4 Co. 76. 10. 30. 37. 2 East. 291. Bac. St. L. 12.

The pleading containing y recital of a public St. is so unlaywer-like, yt. Lee. Mansfield D. yt. he wd. tie y pleader down to half a letter in such a case. It unnecessarily increases costs & lengthens y records. It is often sd. yt. a public St. may be given in Evid. under y genl. issue - But this language is incorrect & a legal solecism.

Potesene. 125.

The misrecital of a public St. in some of 36 y books, is sd. to be fatal in many cases & even after verdict, tho it need not be recited.

Bro. Eliz. 245. 230. Cosp. 474.

Le. R<sup>d</sup> 282.

Proc. ab. St. L. 5. Long. 90.

By some it is sd. yt. a misrecital in an immaterial part, is cured by verdict.

Bac. St. L. 5. Bro. Car. 136. 376. 522.

The true Rule in y above case as laid down by Lee. Holt, is yt. a misrecital of a public St. is not fatal, unless y party ties himself up to it. i.e. y St. as recited" as by y words "according to" or "as y St. recited aforesd." But if he merely concludes with y words "aforesd." or similar terms, it is not fatal, for y Judges will reject y misrecited one as surplusage & "ex officio" notice y true St. Le. R<sup>d</sup> 282. Bro. Eliz. 236. 245.

Aug. 90. n. Bro. Car. 222. 2 Mc. Nally 516

The misrecital of a private St. is never fatal after verdict, nor demurrer in common form; For in both these cases, y Ct. having no knowledge of a private St. "ex officio" can't know whether it is <sup>mis</sup>recited or not; it is indeed exactly y same as a note of hand, or a bond, wh. must be produced to make a comparison.

2 Mod. 241. 1 Sels. 356.

2 Mc. Nally. 517.

Proc. 658. Le. Raynt. 282.



If therefore there is a misrecital, advantage must be taken of it in either of 3 ways.

First. By "nul til record" when y. St. is not support y. declaration.

Second. By claiming over & pleading y. St. in abatement.

Third. By craving over, reciting it, & then removing to it, pleading specially y. variance.

When a public St. is to be used by way of defence, it is not genly. to be pleaded specially; but when it is relied on to defeat a specialty, it must at com. law be specially pleaded, to take advantage of it\*. Lat. Note says "y. law seems so highly of a specialty, yt. it must be specially pleaded". Thus to debt on bond, usury must be specially pleaded. But if this were y. reason, the genl. issue never cd. be pleaded on a specialty.

The true reason is, yt. usury is inconsistent with y. plea "non est factum" & whenever y. defence furnished by y. St. is inconsistent with y. genl. issue, it must be specially pleaded, as y. St. of Limitations.

5 Benc. 419. Marginalia 4 St. 72. 5 Co. 59. b. 119. a. 3 Salk. 391.

I have above stated yt. in declaring upon a private St. it must always be recited, but y. recital need not be literal, it is sufft. if it be substantially declared upon, sh. is more lawyer like.

Chit. on Bills 198.

Id. Regt. 153. Exp. rig. 144.

In no case is it necessary to recite y. title or preamble of a St. such being no part of y. Stat. but merely y. name & reasons on wh. it is founded.

Bac. Stat. L. 5. 5. 4 Co. 76. 2 Mod. 57. 2 Roll 466.

It was once determined, yt. y. misrecital of y.

title of a public St. was not fatal on demurrer, but mere surplusage. It has since been determined secus, in latter decisions. I think correct; for y party ties himself to y Stat. pleaded.

They shal. both be qualified in y manner for both purposes.

When a St. is partly public & partly private, y latter must be recited. 10 Bos. 7. H. K. 27.

A variance in y description of a Stat. on record is fatal. 6 Cr. 474. When y recital of a St.

is necessary y plea must contain, y date of y St. & y place where enacted, or it will be ill on y. demurrer. 1 Hask. 216. 8 Bac. 658. H. L. 5.

6 Cr. 474. Cr. J. 211. Cr. 232.

"But til record" can never be pleaded to a public Stat. as its existence is never made matter of fact. But if a private St. is misrecited, "but til record" may be pleaded, & must prevail, for its existence is a question of fact. 1 Co. 70. 2 Mod. 57.

Cr. 812. 558. 8 Bac. 66. H. L. 5. 2 Cr. 28

It is a genl. rule, yt. in declaring on a public St. y pleader need not count upon it, he need do no more than state those facts, wh. bring y case within it. Carth. 582. Cr. 601. 13 W. 38. 13 Bac 58. Tit. Stat. 19. xii. & 23.

Carth. 582.

But there are three exceptions to y genl. Rule. 1<sup>st</sup>. If there are two concurrent remedies, one at com. law & one by Stat. - If y pleader declare by Stat. he must also count upon it; secus y Ct. wd. not know what remedy he intended to pursue & wd. suppose he claimed y com. law remedy. 4 Bac. 18.

Com. sig. action on St. 9.



2. In an action on a penal St. y Df. must always count upon y St. tho a public Stat. extends not only to indictments & informations, but also to civil actions to recover penalties by St. 2 Hawk. Book. 2. chap. 26. sec. 16. 7. 21. The reason of this rule I know not, except it be founded in y benignity lts. show to criminals, for there appears to me no ground of distinction, between this & a civil action on a public Stat. 2 East. 137. 341. 2. n. 6. do. 126

3<sup>d</sup> If a public Stat. gives a new action unknown to y com. law, he who sues upon y Stat. must count upon it as well as plead it. Some of the books say y party must recite it, but y word "reciting" is there used as synonymous with "counting upon" & St appears yt. Ld. Ellenborough so understood it. Bac. ab. St. l. 24.

They in a mixed action of waste upon y Stat. of Gloucester, to recover the place wasted, wh. was unknown at C. Law. Here y Df. must count upon y Stat. to show on what his action is founded, such being unknown to y com. Law. 2 East. 137.

But where y Stat. barely extends an old action to a new case, the old genl. rule obtains yt. it is not necessary to count upon y Stat. Thus Stat. 4 Ed. 3<sup>d</sup> "de bonis testatoris" Exr in certain cases on actions of Trespass for goods of the testator, taken away during his life time, wh. was unknown to the com. Law. Yet it has been determined yt. y Exr. need not count upon y Stat. as it merely extends y old action of Trespass to this new case - 4 Bac. tit. Stat. l. 2. com. d. St. 4. 24. 136. 85. a. l. 19 Vin. 503. 4. 2 Bac. 439. 445. 1 Dalk. 230.

In an action on a Public St. not Penal it is not necessary for a Plff. to count upon y St. unless there is a concurrent remedy at com. law or unless y St. gives a new form or sort of action. Hence if a Public St. not Penal creates a right or duty & gives damages for the violation of one or neglect of either; he who sues upon y St. need not count upon it for y com. law furnishes y action.

So if a St. not Penal merely creates a right or duty, without giving a remedy or damages, there is no need of counting upon y St. for y com. law supplies y action as in y case above & is more of declaring also. *Leath. 382. Talk. 212.*

If one St. prohibits an offence & another inflicts y penalty, he, who prosecutes them must count on both, for y remedy is contained in neither by itself. *2 Bland. 206. 1 Bac. St. 2 East. 333. 135. 19. Vin. 505.*

From this last it follows y t. if one St. prescribe a penalty for a given offence, & a sub-seqt. St. gives a right of y penalty to any one - then he, who prosecutes must count on both Sts. - otherwise y omission will not be aided even by verdict. *2 East. 233. 333. Bac. ab. L. 4.*

An offence may be laid in y same indictment, as an offence vs. both com. law & St. law. but it must be in distinct counts - to claim 2 penalties in one count wd. be a duplicity wh. ought to quash y indictment.

If y prosecution is doubtful, to avoid failure, he may insert 2 counts; one "contra formam Statuti" y other as a misdemeanor. *Leach Cr. Case 238.*



If part of a Trespass consisting of repeated acts is vs. y com. law, & part of y same Trespass vs. H. it is necessary to count upon y H. in a prosecution for y same, & y words "cont. form. Statuti" will refer to that part of y offence prohibited by H. Salk. 212. Lamb. 282.

Thus entering by force on ones land is an offence at com. law, & hunting upon it is an offence by H. both of wh. may be sued for in one action. Salk. 212.

Loe. Holt says, yt. laying yt. Sept. hunted on G's close is sufft. witht. "contra formam Statuti" H. car. 282.

42. If a temporary public H. having expired, is revived by a subseqt. H. counting upon y same, it is sufft. & proper to count upon y first only, & if y complaint concluded with "cont. for. H." it will be referred to y first, for y first contains y law, & y latter merely contains y duration, or removes y limitation annexed to y first. 2 Hux. 1066. 4 Bac.<sup>638</sup> H. D. & L's.

If y words "cont. form. Stat." are inserted in an indictment for an offence known only at com. law, they will be rejected as surplusage. The rule is thus laid down witht. any qualification in y books - but it will be found in y books yt. y question has always arisen after verdict. Such a demurrer I conceive must be fatal, for there is always an informality wh. is always a good ground for demurrer. Any repugnancy is ill on special demurrer, however unimportant. But (note) there never needs be a special demurrer on indictment.

2 Haack. Ch. 25. 115. 6. 5 T.R. 362. 102. 8 T.R. 362. 5 Com. 22. 26. Com. sig. act. on Stat. c. 2.

When a St. gives a penalty, for a new offence created by it, & directs how it shall be recovered, the offence can't be punished in any other way than yt. directed by y Stat. - Bro. J. 642. 1 Burr. 543.

A deft. who relies-upon y Stat. of another St. must set it forth in his plea. A genl. allegation is not sufft. in such cases. 11 Mass. R. 104. 1 East. 6. And where a St. directs what must be pleaded, the plea must be in the words of y Stat. 10 Mod. 217.

Exceptions. in y enacting clause of a stat. must always be negatived in a declaration, complaint or indictment, grounded upon them.

The omission of yr. requisite is so absolutely fatal, as not to be aided by verdict, but, exceptions, qualifications or Provisos in subseqt. substantive clause of a St. are not requisite to be negatived & no notice need be taken of them. Doug. 321. 1 Burr. 152. 8 T.R. 552. 7 Do. 27.

6 Do. 559. 5 Do. 83. 1 Do. 141. 2. Mc. Kal. 544. 1 East. 646.

This distinction may appear arbitrary upon y first impression, but it is not so in reality. The ground of it is yt. when in y former case y exception is in y enacting clause, it enters into y description of y right created or y offence prohibited, & to properly describe this, it is indispensable to negative y exception, whereas where y qualification is in a subseqt. substantive clause, it forms a matter of defence & does not constitute a part of y offence, wh. may be described witht. mentioning it. 1 Burr. 153. 1 T.R. 141. 6 T.R. 559. 7 T.R. 27. 8 Do. 552. 1 East. 646. La. Rayd. 220. Sec. 8 St. 2.

The same may be sd. of covenants, 42 Bac. 410. Doug. 321. 1 Burr. 148. 2 Mod. N. 555. 1 Lec. 26. Hae. 497.



Thus there is a Cont. Stat. enacting y<sup>t</sup>. who-  
ever shall do any secular business, except  
works of charity or necessity on y<sup>e</sup> sabbath,  
shall be fined; If then y<sup>e</sup> complaint shal-  
l merely state y<sup>t</sup>. such a person did sec-  
ular business on y<sup>e</sup> sabbath, witht. neg-  
ative & exceptions, it wd. not be support-  
ed; for an exception is so interwoven with y<sup>e</sup>  
nature of y<sup>e</sup> offence, y<sup>t</sup>. it can't be described  
witht. y<sup>e</sup> negative.

But suppose y<sup>e</sup> first sec. of y<sup>e</sup> St. mer-  
ely proceeded "whoever did secular business"  
& y<sup>e</sup> execution shal. be in a subseqt. sec. of y<sup>e</sup>  
St. it wd. not be part of y<sup>e</sup> description & there-  
fore no notice of it wd. be taken. This same  
Stat. contains a substantive clause, y<sup>t</sup>. all  
prosecutions under it must be within one  
month. This constitutes no part of y<sup>e</sup> des-  
cription of y<sup>e</sup> offence, & may be used as a  
defense if y<sup>e</sup> deft. sees cause.

In y<sup>e</sup> former case y<sup>e</sup> exception enters  
into y<sup>e</sup> description of y<sup>e</sup> right or offence, in y<sup>e</sup>  
latter it does not, but is mere matter of  
defense. May, 63. Esp. 300.

It has been before observed y<sup>t</sup>. where there  
are two subsisting remedies, one at com. law  
& one by St. y<sup>e</sup> latter of which is called  
cumulative, either may be pursued. But  
whether, if y<sup>e</sup> D<sup>f</sup>. or Prosecutor elects to  
pursue y<sup>e</sup> St. remedy & can't support his  
case under y<sup>e</sup> St. by reason of non-compli-  
ance with some of y<sup>e</sup> requisites, he may in  
y<sup>e</sup> same suit resort to his com. law remedy & re-  
cover as at com. law, if he can make out  
his case at com. law, & y<sup>e</sup> words "cont. form. Stat."  
will be rejected as surplusage. For there is  
a good declaration at com. law witht. it, &

also a com. law right of action. And it is now sett- No. 3.  
led yt. this applies as well to criminal as to civil Municipal  
cases, tho' it was formerly thought otherwise. Law.

2. Burr. 799. 80. 803. Atk. 45. Cowp. 548. 2 Hask. 211. 2 Keble. 128. 2 Hale 191. 5 T. R. 169. 1 Lev. 421.  
5 Bac. 419. 2 M. R. 493 & 5. Contra. Cro. & 201. 307. 697.  
5 Co. 99. 2 Hale P. C. 71. 170. 1 Cro. Car. 231.

There is a St. in Court. wh. gives double damages for trespass in night season, whereas com. law only gives single damages. Here if y<sup>e</sup> J<sup>ts</sup> fail on y<sup>e</sup> St. the may recover at com. law. This was so decided in Court. but it supposes y<sup>e</sup> indictment sufficient at com. law to warrant it. So in y<sup>e</sup> case of a libel, wh. is punishable both at com. law & by St. yet y<sup>e</sup> party may be punished at com. law only, tho' y<sup>e</sup> St. points out another & this is optional with y<sup>e</sup> J<sup>ts</sup> or prosecutor. 2 Burr. 803. 5. 34. 4 T. R. 302. 2 Hask. 302. Leach. 295. Salk. 212.

2 Hale P. C. 191. 5 T. R. 169. 1 Hask. 211. 2 Keble. 128. 2. Cro. & 201. 307. 697. 1 Hale 171. 71.  
5 Co. 99. 2. Cro. Car. 231. 170.

If that wh. was no offence at com. law is made illegal by St. & a particular mode prescribed by St. to prosecute for it; That mode it is usually so. must be pursued to y<sup>e</sup> exclusion of all others. Thus if a St. creates a new offence & provides yt. it is to be prosecuted for by information, it is so. yt. no prosecution of any other kind will lie. Cro. Jac. 644. 1 Salk. 45. 7 Co. 36. u. 4 Burr. 2323. 2 Do. 803. 5. 835. & in 11 Mod. 194. In wh. a prosecution for usury is cited as an example of y<sup>e</sup> rule, wh. is inapplicable, for usury was indictable at com. law. I wd. have observed yt. neither y<sup>e</sup> 10<sup>th</sup> or 11<sup>th</sup> of Mod. are considered good authorities. 2 Hask. 302. 3 Bac. 651. 575.

The above rule as a genl. one must be qualified, & there are only two classes of cases to wh. it can apply, tho' these may comprehend a



majority sh. may occur under it. - They are -  
 1<sup>st</sup> When the particular mode of prosecuting is prescribed under a prohibitory or enacting clause. 2<sup>d</sup> When there is no prohibitory clause properly so called; but yet it merely enacts, yet of doing of an act, not before punishable, shall be punishable for future in such & such a particular manner - then it is necessary to pursue such particular remedy.

The Rule holds in these 2 classes only.

2 Hask. 302. n. 1 Burr. 544. 5. 4 T. R. 203. 2 Burr. 803.

And the reason of the above is yet of offence & remedy are created together & so blended in the act, yet they can't be separated in prosecution; For the mode of prosecution being prescribed in & forming a part of a very clause as it must be founded, it is presumed to be the intention of the Legislature, yet this mode only shd. be pursued.

But on the other hand if a particular mode of prosecuting is prescribed in a separate substantive paragraph, or clause, any com. law prosecution sh. be adapted to the case may be pursued; for such a distinct substantive clause does not oust the com. law by mere implication. 4 T. R. 204. 2 Hask. 302. - Ex. 98 Stat. enacts yet it shall not be lawful to recd a private nuisance & any person who does so shall be prosecuted by information - here there being no distinct prohibitory clause, they can't be separated in the prosecution - but if it be further enacted &c. the offender may be prosecuted in any way.

And if yet sh. was an offence at com. law before, is prohibited by Stat. either the com. law or Stat. proceedings may be pursued

to punish y offender. This is implied in y very supposition yt. y st. remedy is cumulative.

Here then is a remedy independent of y st. wh. y st. does not exist by supposition. This Rule it is to be observed, relates to a diff. class of offences from y former; yt. applies to new offences, whereas this prescribes a new remedy for an old offence. 2 Hask. 302. 4 J.R. 402. 2 Bwv. 803. 5. 24.

If a st. creates a right or an offence & 46. prescribes no remedy or punishment. y com. law will lend its aid to enforce y right or punish y offence as a misdemeanor.

Thus if a stat. merely provides yt. no person shall do such an act & no more, he who violates this act is guilty of a misdemeanor at com. law, for violating y wholesome regulations of society, & hence it is neither necessary nor proper in this case to count upon y st. for y com. law will afford a proper proceeding. 1 Bwv. 544. 3 Lev. 290. Doug. 525. Cro. 635. 10 Co. 75. 6 Mod. 26. 2 Co. 139. 56. 74. 19 Vin. 229. 512. 8. 1 B.R. 229. Bac. ab. "st. a."

So to obstruct y execution of powers granted by st. is an offence at com. law, & y indictment for such obstruction must not be founded on stat. The indictment need not & ought not to conclude "contra formam statuti".

Ex. if st. enables commissioners to lay out highways. Here an individual resisting such is guilty of an offence at com. law & must be so prosecuted for it. It is y province of y com. law to punish disobedience. Doug. 425.

If a civil remedy in such case is sought, it is sd. to be by action on stat. i.e. y right to be enforced is given by st. but y recovery is furnished by common law. Doug. 255.



If an offence thus created is to be punished, & offender is to be prosecuted as for a misdemeanor in violating wholesome regulations of & State.

### Who may prosecute upon Penal Statutes.

It is an elementary principle of com. law & a public offence can't be prosecuted by an individual in his own private right or capacity, originating in & genl. principle of & municipal Law, & & party injured by & offence is & one entitled to & remedy & to prosecute for it.

Hence as the party injured by a public offence is & public, & right of prosecution belongs to them. 4 B.M. 235. 7. 2. Hawk. 265. In Eng. & ~~maxima~~ King. 4 B.M. 2.

Notwithstanding this genl. rule of Eng. practice, private persons do prosecute offences of the highest nature, even felons, when no part of & penalty is given to & prosecutor, & even by indictment. They prosecute thus in most cases (it seems) for & costs, but this is in & King's name & for & King who is & party injured by crimes, in all monarchical governments. The individual is here considered as merely & "informer" his name not even appearing. 2 T.R. 47. 190. 198. 205. Leach's Crs. cas. 41. 242. 253. 257. &

The prosecution means thus - "The King on information of A. B. vs. C. D. &c. This rule depends altogether on examples, there being no law authorizing it. (This is unknown in & N. S. 2 T.R. 47. 190. 8. 205. Leach. crs. cas. 70 & onward to 205.

When it is so, & a public offence is not to be

prosecuted by an individual, it is not meant yt. an action will not lie vs. y offender for y private injury suffered, it only means yt. no individual has a right in his own name, to prosecute for an offence vs. y public, but unquestionably, y party injured may sue for the civil injury. But there is a mixed species of prosecutions, partly public & partly private called Qui Tam, - wh. is commenced & carried on by individuals in their own names both in N. S. & in Eng. It is a prosecution brot. partly in behalf of y prosecutor, & partly in behalf of the King or State, & derives its name from y original words of y complaint, viz. "qui tam pro domino rege quam seipso scripserit". 4 Bk. 208. 716. 162. com. D. act. on St. C. 1. 183ac. 37. 2 Hask. 264. & see -

48.

It is incorrect to say as is genly. sd. yt. y state is a party to y prosecution, for it is not in any sense strictly a party, tho it may reap benefit of y prosecution. The individual prosecutes alone & is y only party, tho he does it in behalf of y state as well as himself. This is practically important; tho not genly attended to.

1 Hils. 125.

bush. ser. 7 D.R. 257. 170. 756. 758  
27. 1148.

Qui Tam Prosecutions. are either by action or information. This is another distinction not duly attended to in most of the books, & certainly not in common parlance. A "qui tam" action is carried on by civil process, but a "qui tam" prosecution information by criminal process. This is y distinguishing criterion (i.e.) a "qui tam" commenced by original writ information or capias or a forthwith (to speak vulgarly) is a criminal proceeding or "qui tam" information, & the proceedings are as in all criminal cases. Whereas a "qui tam" complaint commenced



by original writ is a civil case or proceeding.  
It is then of the form of an action, yet determines  
its character. 3 Bk. 161. 2.

An action thus brought by an individual in his  
own right on a penal St. is a civil action.  
The action itself does not decide its charac-  
ter, but of form of it.

Thus an action brought to recover a stat. pen-  
alty for bribery is a civil action & a mere  
action of debt. Coop. 382. 1 Mil. R. 5. 2 T. R. 448.  
4 ib. 756-7-8. 7 ib. 257. Keb. 118.

This distinction is not merely nominal but of  
great practical importance, the incidents of a "qui-  
tam" action & a "qui tam" prosecution being very  
diff. For in civil cases, a deft. is entitled to  
15 days notice, a criminal prosecution is forth-  
with; in the former he pleads by attorney, in  
the latter "in propria persona". In civil cases a  
verdict is amendable by the St. of amendments,  
but not in criminal cases. In civil cases in  
Eng. an affirmation of a Quaker is admissi-  
ble, not so in criminal.

From the county Cts. no criminal cases are ap-  
pealed, tho many civil ones are.

Qui Tamps of both kinds are genly. brought  
upon penal Sts. to recover a penalty or for-  
feiture of some kind, & none other than pen-  
al Sts. Indeed as understood at present, they  
are treated & understood as creatures of penal  
Sts. 2 H. L. 377. 1 H. L. Qui Tamps, strictly speaking are  
unknown to our com. law. There was a proceed-  
ing of a similar nature, if we may judge  
from the words used in it "Tam pro nomine pro  
rege quam &c." but so rare yet its nature is

hardly at present known. When St. gives a penalty to him who will prosecute for same, it is called a "popular action" & so called because it is given indiscriminately to y people at large. In some cases y whole penalty is given to him, who prosecutes for it; but now only 2 Hawk. 265. Com. St. c. 1. 1/2 to y prosecutor & y other to y King or State.

Co. L. 877. Co. L. 200-1. 5112. - 2 Bk. 477. 300. 160. Jac. 2. 100. 100. 100.

If an individual is civilly injured by an offence prohibited by St. he may have his private remedy by a civil action or y St.

The St. implicitly gives a remedy.

A "popular action" is not necessarily a "qui tam" action, tho' treated as synonymous in y books in wh. they are much confounded. A "popular action" may or may not be a "qui tam" as y case is; for where y whole penalty is given to the prosecutor, it certainly is not as he sues in his own name, but a "popular action" tho' from what appears in some of y books, Part. 2. Prac. & Hawk. it wd. seem that here y "qui tam" form might be followed; but 2 Bk. 161. I apprehend they are incorrect. Com. 100. 100. 100. 100.

But when y penalty is to be divided it is a "qui tam" action. On y other hand a "qui tam" is not necessarily a "popular action" for the remedy or right to recover may be limited to y party aggrieved by y offence, in wh. case it is not a "popular action" & hence y prosecutor or y party must sue "qui tam" as y penalty is divided. 2 Hawk. 177. 1 Prac. 177.

Having premised thus far by way of explanation of y nature of these 2 actions. I shall proceed to inquire in what cases an individual may sue upon a penal St. in his own name & in



any form. It is a genl. rule yt. whenever a St. prohibits or commands a thing for y advantage of individuals, or protection of private rights, an individual may have an action on y St. for an injury occasioned to him by its violation, & this rule holds tho y St. is penal merely, & so, (to speak negatively) expressly gives y individual no remedy. The example given above in y case of a nuisance, will illustrate y rule.

10. Also if an individual is civilly injured by an offence prohibited by St. he may have his private remedy by civil action as above.

When a St. inflicts a penalty on any one for dispossessing another of his right or interest with the making any appropriation of y penalty, he who is injured by a violation of y St. is entitled to the penalty & may recover it by action & not y king or public. For as y Legislature inflicts a penalty with the appropriating it, it is presumed yt. it was for him, who shd. be injured by y transgression. 10 Co. 75. *Donna ac. St. a. l. Bacc. St. R.*

Thus an Eng. St. prescribes a penalty for not settling out tithes, here y penalty goes to y parson entitled to y tithes, who was injured by their not being set out. It has been sd. in this case & others of y same nature, yt. an act lies upon y St. at com. law to enforce a right afforded by St. This literally implies an absurdity y meaning if it is, yt. y party has a remedy supported by com. law to enforce a right afforded by St. - & thus understood it is true.

2 Ld. 280. Co. Lit. 109. *Comm. sig. int. St. R.*

11. The next question yt. presents itself, is in what cases an individual may prosecute "Qui Tarn" on a penal St. & not merely where there is a remedy & who may have it?

It is genl. rule yt. if for an offence immediately

injurious even to y public only, a St. gives a penalty or part of a penalty to him who will prosecute for it, any individual may have a "Qui Tam" on y. St. who will prosecute vs. y offender for y penalty. Ex. St. vs. smuggling gives a penalty to him who shall prosecute. 2 Hask. 377.9

4 Co. 13. § 95. Com. Sec. ac. m. H. & C.

The rule as to down in y books is, When y whole penalty is given to y individual &c. But in y case I apprehend it wd. be at least unnecessary in principle, if not improper to prosecute "Qui Tam" wise as y individual does not sue for himself "as well as &c." he may tam- with-  
doubt prosecute on y St.

If for an offence St. inflicts a penalty in favour of y public & allows a sum certain to him who prosecutes with effect; any individual may prosecute "Qui Tam" wise for it makes no diff. between a gross sum & a part of y penalty & in both cases he who first commences his action has an interest in y sum or penalty.

But when a St. prohibits an act immediately injurious to y public only; unless a penalty &c. is given to y prosecutor, no individual can have an action upon it, nor an information in his own name, for he has no interest in y penalty & no right of any kind under y St. Ex. penalty for smuggling, not given in whole or in part to any private prosecutor & no forfeiture given him. 1 Bac. 27. 2 Hask. 377. or 265.

But if a St. prohibits an offence immediately injurious to an individual as well as to the public, & expressly gives the party-injured, a penalty or part or damages for y injury; here y party & it is wd. ought to sue "Qui Tam" wise for y penalty, especially if y public is entitled to a fine it seems tho- no fine is given to y king or public. 4 Co. 13. a.

2 Hask. 377.

3 B. & K. 161.

12 Co. 124. Cro. Jac. 124.



Qu. However if y whole penalty is given to y party injured where is y propriety of his suing "Qui Tam vice"? For he may undoubtedly sue in his own name with. joining y public or declaring in "Qui Tam form". 2 Chit. pt. 187. Com. sup. ac. 11.

§ 54.

And genly speaking where a fine or penalty of any sort is given to the public & a civil remedy to y party injured, y fine is of course inflicted upon conviction in y civil suit, tho y prosecution is not "qui tam". This is y case of all actions of trespass at com. law when y judgt. was capiativ.

Where no form of action is prescribed by st. for y recovery of st. penalties, Debt is y most common & proper action, but this is not y only action. There is a species of action in y st. which lies in this case. However it seems a writ of debt will not lie at com. law to recover a fine tho it will for an amercement. The theory is this - when y st. provides yt. y transgressor shall pay a certain sum to y person prosecuting, the commencing y action to recover it makes y offender his debtor. 3 Dalk. 1001. Popk. 178. Bacon's "H. R."

It was holden in one case yt. Indebitatus Assumpsit wd. lie. But y act. is never brot in Eng. & I trust wd. not lie. Smith, 12. 2 Lev. 250. exp. 7.

But how can Debt lie? For before y prosecutor commences, no penalty is due. The st. declares yt. penalty shall be forfeited to him who will sue for it; is this positive provision or has virtually enacts yt. y offender shall be indebted to y party prosecuting for y same, nor is the doctrine as fanciful as yt. assigned by some, viz.

yet such offence is a breach of the social compact.  
an action of *Indeb. Ass't* was once supported to re-  
cover a penalty in y case of *De-page*, but this co. not  
be supported at present, at least it wd. be a har-  
ardous experiment to y. *Plt.*

Where y penalty is given by St. to y state or king  
& partly to y prosecutor, y state may prosecute  
& recover y whole; For y penalty is given partly  
to y prosecutor, merely as an inducement for him  
to prosecute & not for any claim he has on  
account of y public offence. Moreover, when y  
state prosecutes, it may be so. to take y  
penalty by halves, as State & prosecutor.

A "bona fide" conviction on a "Qui tam" com-  
plaint either by action or information, is a bar  
to any subseqt. prosecution, suit or even in-  
dictment for y same offence, because y end of  
y law is obtained & y punishment inflicted.

So on y other hand, when y State  
prosecutes, no individual can maintain y ac-  
tion, & y bar is mutual; - for if it were not  
y offender might be tried twice, convicted &  
punished for y same offence. - 11 Co. 65. 6.

Com. Dig. ac. R. & c. 2 Hawk. 276.

So y pendency of a "qui tam" action or infor-  
mation may be pleaded in abatement to a sub-  
seqt. information or indictment if commenced  
for y same offence.

Many of y books & among them *Hob.* say it may  
be pleaded in bar, but this is incorrect; for *Ld.*  
*Mansfield* says it must be pleaded in abate-  
ment - *scilicet* if y prosecution shd. be with-  
drawn & next day, y party wd. escape with im-  
punity. 1 Burr. 1421. 2 Hawk. 271. 275. *et seq.* *Hob.* 205.

*Proc. & Cor.* 61.

13 Jac. 41. ac. "qui tam".

Under a penal St. giving a penalty or any



sum of money to him who will prosecute or sue  
for it, no individual has any right attached  
to him till action brought for it, no person having  
any claim before, & he who first commences ac-  
tion, attaches this right to himself, by comm-  
encing y action, an inchoate right is acquired,  
wh. is consummated by judgment. 2 QB. 437. 2 Stra 1169.

5 B. & C. 192. 2 Lev. 141. 2 Hawk. 391. octavo. 2 H. Bl. 310-11 1736.

The penalty before action brought is like prop-  
erty unoccupied in a state of nature, it is a-  
nalogous to y "hereditas jacens" of y civil law.

I speak now of y penalties given by pop-  
ular actions - as to y remedial actions y rule  
is secus.

It is an essential part of this rule yt. y  
penalty be given to any one who will prosecute  
& not to y party aggrieved.

When a penalty is given to any one who will  
prosecute for y same by St. y King or King  
may bar a popular action by releasing the  
whole penalty, or granting a pardon before  
action brought. But if a "qui-tam" action or  
prosecution is commenced, y state can release no more  
than its part of y penalty; for a right of recov-  
ery attaches in y prosecutor by y commencement.  
If y suit of such prosecution can't be defeated  
by a "nolle. pros." by y govt. y gent. except for  
y part wh. belongs to y King or state; for  
y right tho. inchoate is vested. Or can y  
state or King discharge or suspend a suit as  
to y other part if duly commenced. \* 2 Hawk. 392. octavo.

It is said yt. Parliament can release a  
whole penalty after action brought. It is hard to say,  
that an Eng. Parliament, it being omnipotent can't  
do, but I shd. think this beyond their power

\* Bro. C. 135. 553. 11 Co. 5. 6. 2 QB. 437.

witht. repealing y<sup>e</sup> St. It is certainly contrary to principle, & I apprehend no Legislature in y<sup>e</sup> country d. release it. witht. repealing y<sup>e</sup> St. For to defeat y<sup>e</sup> vested right, tho' inchoate wd. be equally as extravagant, as to release recovery on a private note of hand. They cant release a right vested in an individual. 2 Bk. 437.

But on y<sup>e</sup> other hand when y<sup>e</sup> penalty or part of it is given to a party injured by y<sup>e</sup> offence, y<sup>e</sup> party has a vested right in his allotmt. before action brot. It is in y<sup>e</sup> nature of a remedial action, wh. nothing but a repeal of y<sup>e</sup> St. will set aside.

2 Hawk. 392. 124. 100. 2 H. Blk. 311.

Even if y<sup>e</sup> Penalty is vindictive in its amt. it is still considered as remedial, so far at least as to preclude y<sup>e</sup> interference of y<sup>e</sup> King.

It seems at com. law y<sup>e</sup> prosecutor in a popular action on a penal St. might release his part of y<sup>e</sup> penalty after y<sup>e</sup> conviction wh. wd. be a bar to a subseqt. prosecution by y<sup>e</sup> same or any other p<sup>ty</sup>. Tho' before such conviction, such release wd. be of no avail, even at com. law as to securing impunity for y<sup>e</sup> offence; for y<sup>e</sup> prosecutor's right to y<sup>e</sup> penalty is not consummated till after conviction & y<sup>e</sup> same prosecutor may sue again. 2 Hawk. 192. 401. 176. 2 Roll. Rep. 33.

But this right to release in a "popular action" by reason of y<sup>e</sup> collusion practices, occasioned y<sup>e</sup> St. 4 Hen. 8. wh. enacts y<sup>e</sup> no recovery in a popular action shall be a bar to a subseqt. action or prosecution, but by an individual for y<sup>e</sup> same offence, & also y<sup>e</sup> no release pending y<sup>e</sup> action by prosecutor to Def<sup>t</sup>. shall prevail to deprave public justice; this way



to provide w. sham. Prosecutions, & is one of those  
ancient stats. which is "prima facie" of Law of  
220. J. 2 Ha. L. 292. 270. 303th. 102.

Indeed I am of opinion y<sup>t</sup>. y above St. is only  
in affirmance of y com. law as respects covin  
& fraud; for I trust there is no reasonable  
doubt y<sup>t</sup>. a covinous recovery is ascertain'd w.  
be void at com. law. Sir Mansfield says  
there is no transaction however solemn, y<sup>t</sup>.  
grants will not vacate - moreover y<sup>t</sup>. ques.  
tion involves y authority of records.

1 Bosw. 595. 2 Co. 77.

It is further provided by St. 18 Eliz.  
y<sup>t</sup>. y prosecutor can't compound y action in any  
manner till after plea pleaded, nor then  
witht. leave of y Ct. on pain of pillory &  
other punishment. & it is discretionary with y  
Ct. to grant or refuse leave, & when leave to  
compound is given, y<sup>t</sup>. part of y penalty belong-  
ing to y public must always be pd. in Ct.  
Comm. dig. H. L. R. 1 Bosw. 43. 1 Bos. & Pul. 18 5 T. R. 95. Sta. 167.

It is a rule of practice, y<sup>t</sup>. after verd-  
ict, y Ct. will not give leave to compound, ex-  
cept on proof of y poverty of y deft.

Comm. St. L. R. Sta. 187. 4 Bosw. 1923.

Even a "bona fide" release of y prosecutor  
do. not at com. law bar y right of y pub-  
lic, to y public part of y penalty pending y  
prosecution. But a bona fide release even  
witht. leave of y Ct. after conviction do. bar  
an action for y same offence, but by any  
other individual & even after prosecution  
commenced, but this is now abrogated by 3<sup>th</sup>  
H. 8<sup>th</sup>.

11 Co. 65. 6. 2 Hawk. vol. 275. vol. 271. 2.

Suppose y prosecutor practices fraud to

defeat a public prosecution, as to delay, y<sup>t</sup>. y. St.  
of Limitations may bar it & then with-  
drawn. not be punishable as for a misdemean-  
or? Judge Gould & I think he wd.

But when y action is given to the party injured  
by y offence & he dies or releases y<sup>r</sup> suit,  
or supports a non-suit, the state can't pro-  
ceed on y prosecution; for y Off<sup>r</sup>'s part can't go  
to y state, nor can it plead for its representa-  
tives. The State can't become Ex<sup>r</sup>. to y prosecutor.

303k. 182. Reg. 100 - 2 Hask. 992. 275. 11 Co. 65. 6. 370. 48. 6.

If several persons are convicted on one pros-  
ecution on a penal St. in some cases several  
penalties are inflicted, & in others only one pen-  
alty can be recovered vs. them all. Reg. 100.

This distinction is perplexing & has confused  
y Ct. counsel & every other class of persons.

Rule. As punishments are in this nation sev-  
eral, each to several joint-offenders, connected in  
one prosecution, civil or criminal, is to be a  
several penalty, & when y sum is precise, y<sup>t</sup>.  
precise sum is to be inflicted on each, how-  
ever numerous y convicts.

Exception 1<sup>st</sup>. Where y penalty is given  
by way of satisfaction to y party grieved by  
y offence, in such there shall be but one  
satisfaction - There is a contrariety in y books  
on y subject. 6 Co. 6. 500. 4. Dyer. 245. Salk. 182.

Coop. 610. 2 Com. Rep. 309. Mac. H. R.

Exception 2<sup>d</sup> When from y phrase-  
ology of y St. it appears one joint penalty  
alone was contemplated. as thus - If a St.  
"any person or persons committing such an  
act, they shall forfeit". But here if y lan-  
guage had been "he or they shall forfeit" y  
case wd. have been diff<sup>t</sup>. 2 Case. 575. 4 T. Rep. 807, Salk. 182.



Further this rule requires an exception. tho' the language of y. St. shall seem only to contemplate a joint penalty, yet if y. offence was punishable at com. law. this is sufft. evid. yt. a several penalty was contemplated by y. Legislature, notwithstanding y. contrary phraseology; for all penalties are several at com. law, & y. Stat. remedy is cumulative, & as joint offences are severally punished at com. law, y. same must be y. case by y. St. But in all cases whether within y. genl. rule or either of y. exceptions, it is y. intention of y. Legislature yt. governs.

If Debt is brot for y. recovery of a penalty vs. joint offenders, there can be but one penalty recovered at any rate; in consequence of y. form of y. action, there is but one entire debt & so y. Ct. must consider it, & give but one judgment of one entire recovery.

When y. St. requires but one penalty; Debt is y. most common & proper form of action, & as debt lies only for y. recovery of one penalty, so where y. penalties are several, Debt will not lie as decided.

1. 8. Rep. 245. 2 East. 589.

4. 1. Huf. 137.

And as two or more persons may join in committing one offence, so on y. other hand, there are cases in wh. any number of continued acts may go to constitute one entire individual offence, & if y. offence is prohibited by a penal St. there can be but one penalty recovered; for all these conjoined acts, taken together, constitute but one offence. I will illustrate this by a former example of y. St. enjoining y. observance of

of Sabbath. If a man takes the 4th day he shall not incur a penalty for distinct parts of 4th day, but only one penalty, 7 acts being in continuity. - So it is 7 continuity of 7 acts 4th constitute battery. (100 p. 640.

In a popular action, 7 P'ts. by 4 Eng. law, are entitled to no costs unless expressly given by 4 Stat. or by some genl. St. giving 7 P'ts. costs in such cases.

But where a penalty is given to 7 party injured by 7 offence, he is as much entitled to costs in this as in a civil action, for 7 penalty is given as a compensation for 7 injury sustained & 7 costs shall go to satisfy 7 party for 7 default of 7 Debtor in not satisfying this damage witht. action but as he shd. have done.

2 Roll. 781. 1 Roll. 574.

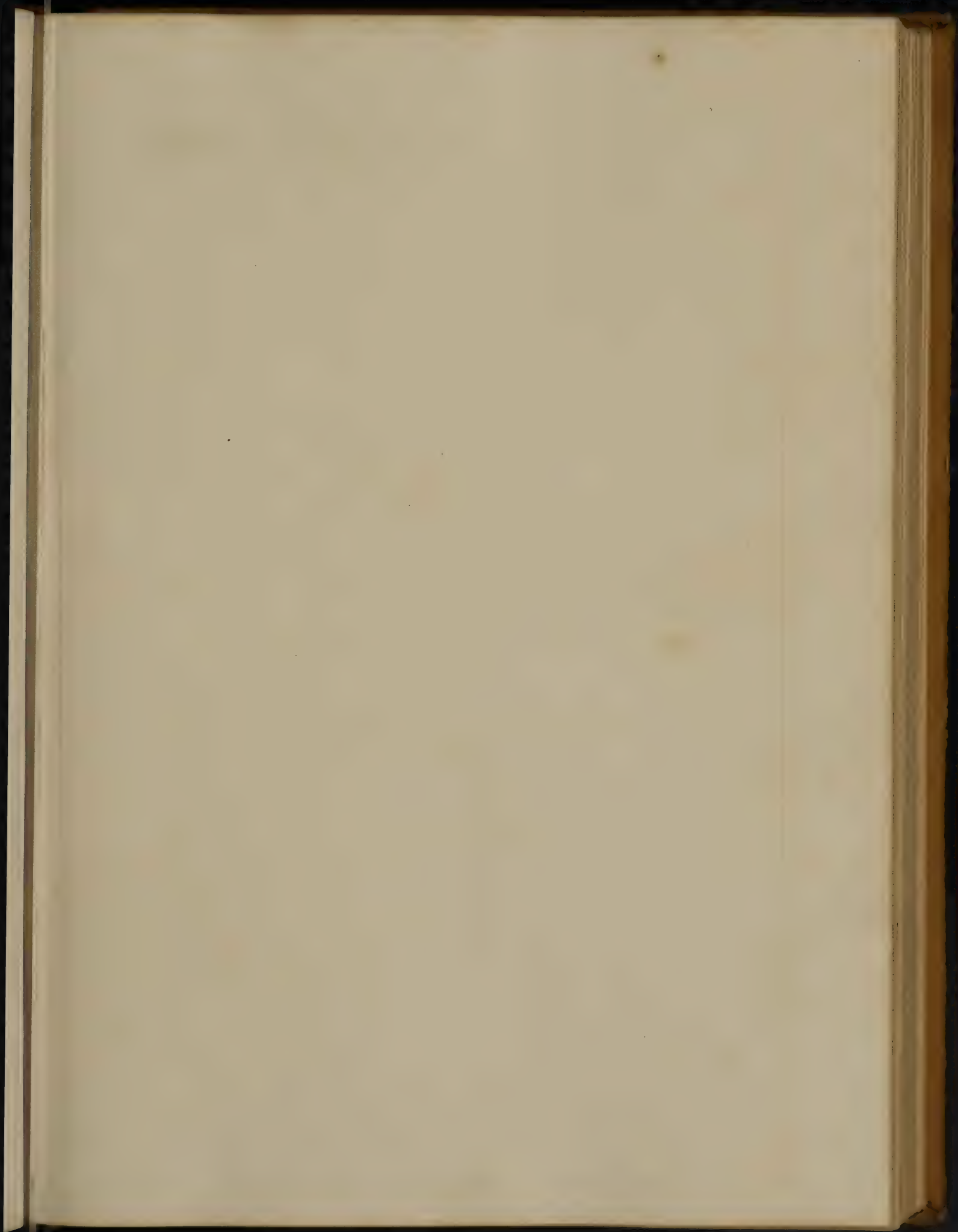
Cullock. 17. 19. 201 - 2 Haist. 274. 4th. - Salk. 206. 1 Hen. 33. 10.

In Count. 7 prosecutor always receives costs where Judgt. is vs. deft. & pays costs if Judgt. is vs. himself.

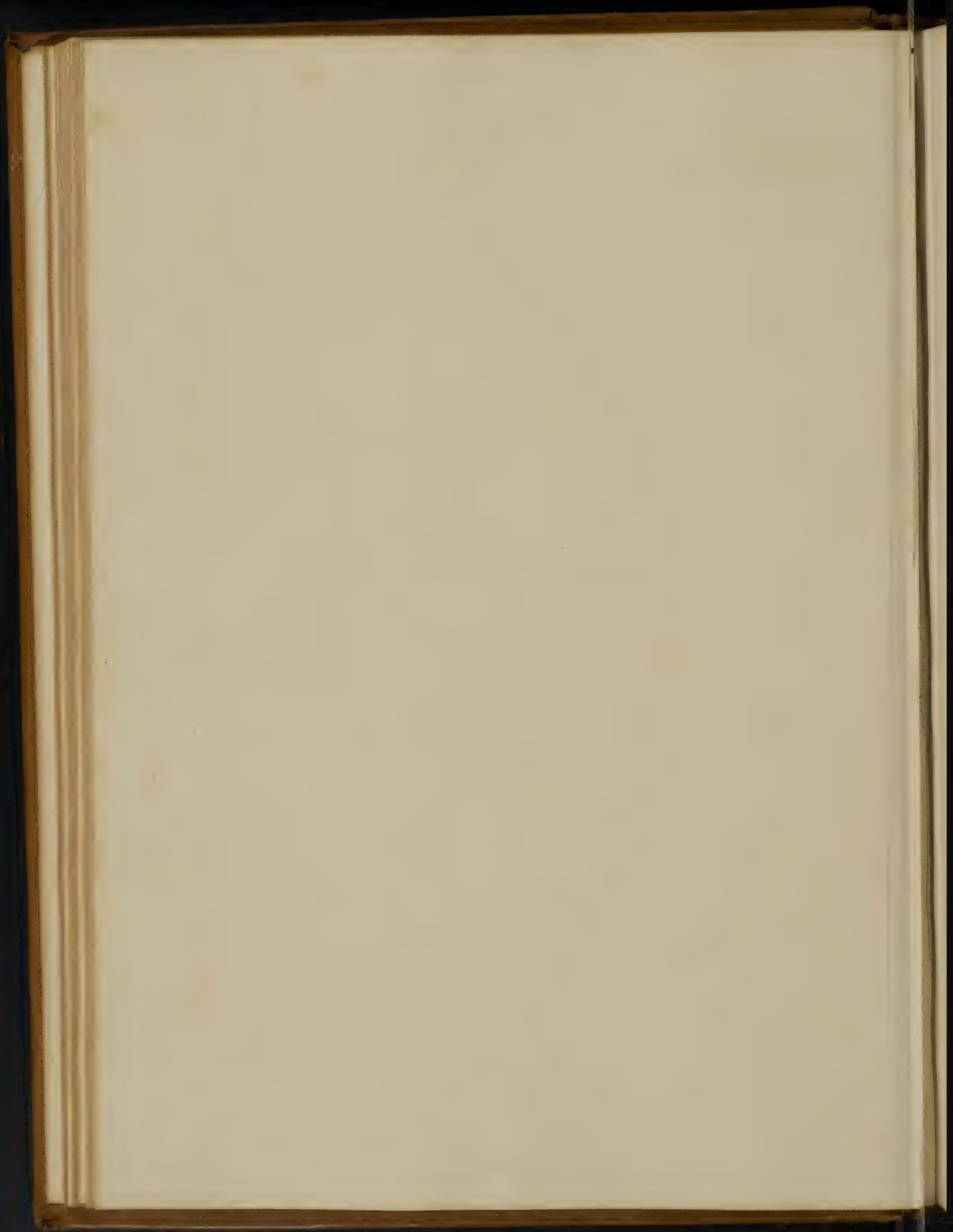
Litchfield. 24 Aug. 20<sup>th</sup>  
1826.  
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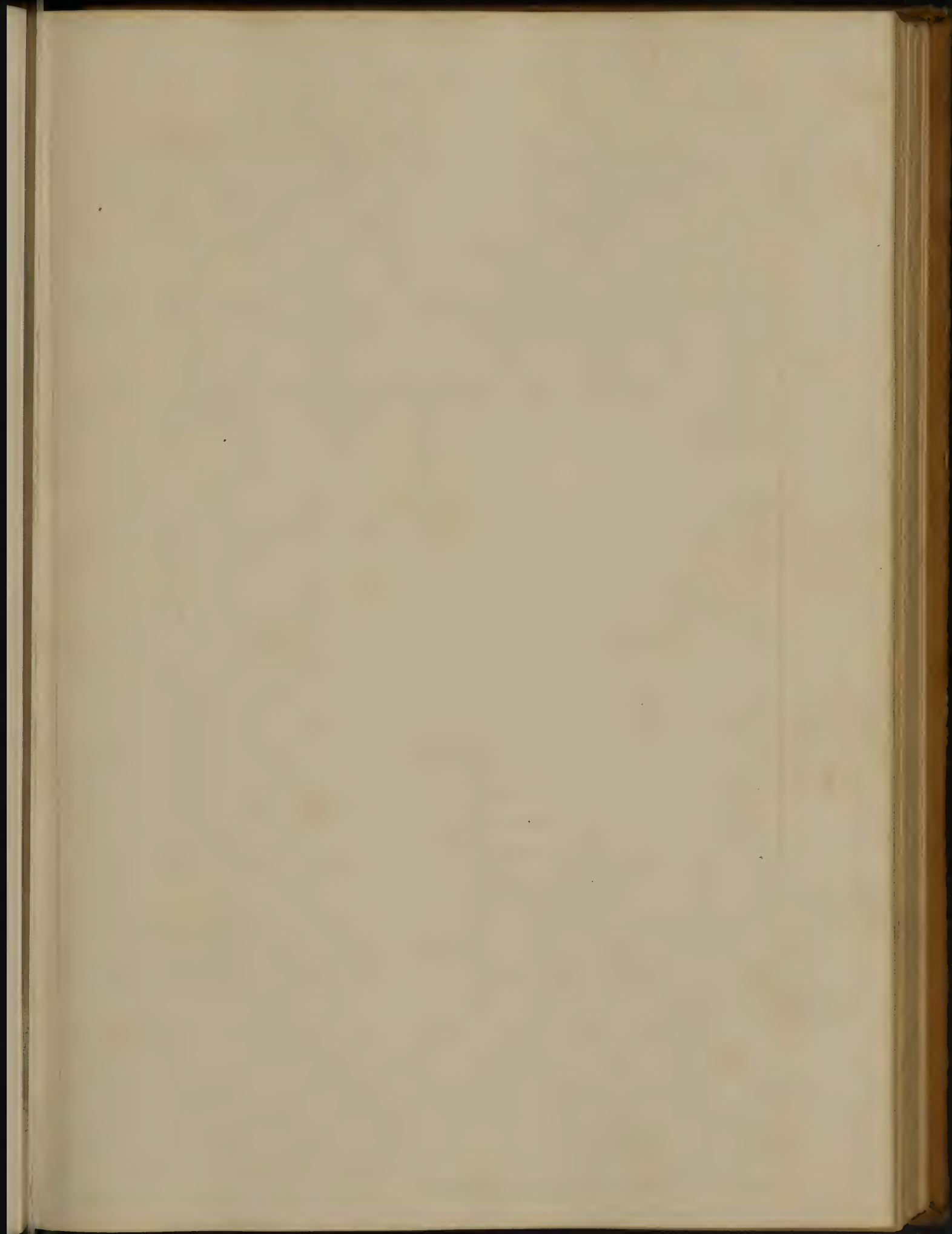














The subject matter of Municipal Law is divided into two genl. heads. Rights & Wrongs.

Its object is to guard & enforce the former, & to prevent & redress the latter.

It is necessary that rights be first understood, wrongs being but privations or violations of justice or right.

Rights are of two kinds 1<sup>st</sup> Persons. 2<sup>d</sup> Things.  
Wrongs are of two kinds. Private and Public.

Persons as contemplated by Municipal Law are of two kinds. 1<sup>st</sup> Natural. 2<sup>d</sup> Artificial.

Natural are human beings considered in their natural capacities. Artificial are such as are created by Law & are called Corporations or Bodies Politic. Ex. Cities, Corporations or Societies & other incorporated companies.

These derive their existence from the act or charter of incorporation, created to maintain a perpetual succession for the purpose of maintaining certain particular rights & for perpetuating those rights.

The rights of persons considered in their natural capacities are of two kinds. 1<sup>st</sup> Absolute. 2<sup>d</sup> Relative.

1. Absolute are such as belong to individuals considered as individuals. Such as belong to them even in a state of nature. These constitute what is called natural liberty. 13th, 125.  
These rights are so far as their enjoyment is consistent with the preservation & welfare of civil society.

are enforced by municipal law.

It is obvious then that absolute rights cannot appertain to artificial persons, since they derive even their existence & of course all their rights from the institution of civil society.

The absolute rights of persons comprehend. 1<sup>st</sup>. The right of Personal security.

2<sup>d</sup> of personal liberty. & 3<sup>d</sup> of Private property.

The absolute rights of persons & y principles of Law which relate to them being few & simple.

I shall treat of them very briefly, giving only an outline of y Law on y subject & referring to Bk. 8 to the head "wings" for a more particular discussion of them.

1<sup>st</sup>. The Right of personal security consists in the right of enjoying life, limbs, body, health & reputation.

2<sup>d</sup>. Personal liberty as here used consists in y power of locomotion, with<sup>l</sup> restraint except by one course of law.

3<sup>d</sup>. The Right of private property, is y right of using, enjoying, or disposing of any acquisition with<sup>l</sup> control, except by laws of y land.

The right of private property is grounded on Natural Law; its modification as y tenure by which it is holden, & y method of exercising and transferring it are derived from society?

II. As to relative rights of persons they are those which grow out of y relations in civil society; or such as belong to individuals considered as members of civil society. The civil rela-



tions from which these relative rights result are either  
Public or Private.

1<sup>st</sup>. As to those relative rights which arise out  
of public relations. Ex. That of Governors &  
Governed, Magistrates & People.

2<sup>d</sup>. The private relations from which rel-  
ative rights & duties result are 4 following.  
viz.

1<sup>st</sup>. That of Husbands & Wife. 2<sup>d</sup>. Of Par-  
ent & Child. 3<sup>d</sup>. Of Guardian & Ward. and  
4<sup>th</sup>. That of Master & Servant.

These are the Domestic Relations.

## Of Husband & Wife.

### Husband's right to the Wife's Property.

In Roman Catholic countries marriage is regarded as a religious ceremony. By y. com. & our law it is considered as a civil contract. 1 Blk. 433.

71.

Husb. & wife are for many purposes considered as one person only in law. 1 Blk. 442.

The forms & requisites of y. contract will be considered in conjunction with the mode of dissolving it in the law of divorce.

Of the legal effects of marriage contracts, & first of the consequences of marriage as it respects the husband's right to the wife's property.

The genl. principle by wh. & law as to this branch of y. subject is regulated is founded on the husband's duty to maintain & protect the wife, & her estate is so far only his as is supposed necessary to enable him to perform this leading duty.

### I. Of the Wife's personal chattels in possession.

These in genl. were absolutely vested in the husb. by marriage, (for y. exception in y. case of "paraphernalia" of y. wife. vide Post. 2 Blk. 435.) he may dispose of them at pleasure & may even bequeath them.

If he die intestate before y. wife, they go to his administrator.

But he has no beneficial interest in personal property wh. & wife has in "dower right". Ex. What she holds as executrix.



Aug. 21<sup>st</sup> 1871.

For by this last St. of inst<sup>l</sup> or Adminis-  
tration is not bound to account with her representa-  
tives i.e. is not liable to distribute her effects, &c.

thus he may hold them as administrator not liable to account.

No such H. in Court. & no such right in herob. In Court. administration goes to next of kin in first instance. H. Con. 185. & there is no special provision for intestacy of wife here & none at com. law, & our Stat. compels distribution withl. exception in herob's favour.

There can't however, either here or in Eng. bequeath wife's choses in action; for a bequest is not a disposition wh. takes effect in his life time.

Co. Lit. 351.

But tho' in Eng. he is not bound as adm. to administer her choses in action he is still liable as administrator to pay her debts out of them. Ex. debts contracted for her while sole. These are assets in his hands for this purpose. Co. Lit. 351. Bac. ab. 335. 6.

By Eng. law if y. husb. neglects to take administration & another is appointed, y. husb. in y. character of next of kin is entitled to these effects. J. G. L. thinks these decisions arbitrary.

Foll. 570. 3. Atk. 320. 10. W. 2. 281. 1 Wils. 158.

It has been held in Eng. th. this right of y. husband is transmissible to his representatives, i.e. they must be pr. over to his representatives & not to those of y. wife. 10. W. 2. 281.

2. Atk. 320.

A third person is not to be appointed administrator, but rather given to her representatives.

10. W. 2. 281. 1 Wils. 158. Foll. 116. 217.



2d. I think these three last rules as respecting  
principles of the com. law & 2 both arbitrary.

75. If settlement by husband or wife is so to be  
an absolute purchase or new choice in action  
as if the wife first can transmit them to heirs,  
sentations, 2d. Ch. 112. 412. 2 Kern. 506.

The rule is now, a settlement is not a purchase  
of her choses unless an express or implied  
agreement. 2d. Ch. 217. 2d. Ch. 292. 100. 112. 199. n. 2d.

But if a settlement is made post marriage, it must  
be adequate, since it is no purchase if new  
chose in action. If it is inadequate it is not  
a purchase even tho' it is expressed, & 2d. Ch. 217.  
must see whether it is a purchase of a whole or  
part or none at all. 2d. Ch. 458.

The husband cannot bequeath choses in action of wife  
during her life or wife unless he has purchased them.  
Lit. 251. 2d. Ch. 238. F. C. 4.

Choses of husband not due to wife are choses in action  
& by 2d. Ch. 12. Hen. 8th were not due to wife while  
sole became absolute to the husband on marriage.  
2d. Ch. 17. 2d. Ch. 334. 5.

This is merely a 2d. rule for at C. L. they are on  
same footing as other choses in action.

2d. Ch. 17. 4 Co. 51. a. Co. Lit. 162 a.  
Co. Lit. 251. a. 2d. Ch. 435.

If a debt of husband be due & justly obtained  
or him or wife jointly they are joint  
debts of husband & wife jointly they are joint  
debts of husband & wife jointly.

1d. 237. 10th. 555-7. 1 Kern. 376. 2d. Ch. 238. F. C. 4.

And if after a judgment thus obtained & either  
of them dies, & "jus accretionis" vests & whole in  
y survivor.

2 Mod. 187. n. p. 84.

1 Ch. 1. pl. 121.

By our law there is no survivorship, & there is  
no "jus accretionis" by y law of France.

In all cases of joint tenancy in land, each  
one transmits his part to his representatives.

But here as in Eng. y right of collection is 76.  
in the husband, if he survives.

The husb. may assign y wife's choses &c. for val.  
consideration, but an assignment with val. consid-  
eration will be set aside by a Ct. of Eng..

2 Atk. 208. 420. 1 Poth. 308.

3 P. M. 117. Rob. & Co. 295.

1 Bro. Ch. 44. 3 P. R. 94.

It has been held, & it is such a voluntary  
assignment, tho' void on a purpose of transferring  
interest as an act of ownership may change y  
property by vesting it in y husb. Rob. & Co. 295. 1 P. M. 117.

But this is now overruled. 1 Atk. 208.

Rob. & Co. 295. 1 Bro. Ch. 44.

But y husb. may release y wife's choses in ac.  
by an act merely voluntary, for a release  
is valid at law, & a Ct. of Eng. can't set  
it aside. 2 Atk. 208. 1 Poth. 308.

When a husb. is obliged to resort to Eng. to  
obtain possession of y wife's choses &c. y act  
will in genl. incline in his favour, except  
he make some suitable provision for y wife, & inter-  
position being discretionary. 3 P. M. 117. 282. 455.





For personal chattels of the wife vest absolutely in husband.

It cont. by wh. a person is bound to the husband 78.  
pay money to wife, is subject to his control.  
for this chose in action is his, & cont. only authorises  
wife to receive & money. 3 Inst. 331. 2 J.R. 331.

What are the husband's rights to the wife's chattels  
Real?  
~~~~~

Chattels real are such as houses & & realty.  
as terms for yrs. of land, &c. mortgages &c. 2 B.R. 386.

The chattels real of wife, during coverture, are  
liable to husband's debts, & may be taken  
in execution for payment of such debts, for they can  
be taken in execution. Co. Lit. 46. 331.  
1 B.R. 554. 1 Roll. 344. 4 J.R. 638. 9

Husband has a more extensive right over chattels real, & choses in action,  
but he has not the same right to her chattels  
real as he has to her personal estate in possession.

If husband does not survive wife, & wife's chattels  
real during coverture, they go to her survivors for  
they are joint-tenants.

They are not to all intents joint-tenants, if so,  
he can only survive of a moiety.

They have determined in Court, & wife's 79.  
death, during husband's life they go to her  
representatives, & just because being unknown to our law.  
2 Ray. 238.

But by C. L. neither husband nor wife, can  
revise these chattels real, for right of survivor  
is born & paramount to right of devise. Br. Ch. 418.  
4 Bul. 286. 1 H.B. 528. 2 B.R. 331. 2 J.R. 331. 1 B.R. 554. 2 J.R. 331.



But by an act, saving their joint lives, a husband  
may suppose if there is no act in person even after  
his death, for here a right of interest passes  
instantly. Co. v. 287. 1 Roll. 339.

But not liable for his debts if wife sur-  
vives, for her right is prior & paramount to her  
husband's creditor. Lit. sec. 286. Co. Lit. 184. b.

1 Bac. 209. 10.

Now by C. L. are they liable for wife's debts  
if she dies first, for here a husband's right of  
survivorship excludes her right.

See "Joint Tenants" page 9.

\* Now in Eng. are they liable for wife's debts if she die first.

1 Bac. 209. Lit. 286. Co. Lit. 184. b. "St. Germain" 79.

If a woman sole owner joint ten. of chatt. real  
marries & dies & whole goes to her then ten.  
for his till is prior to the husband's.

Plas. 418. Bac. ab. Bar. & J. - C. L. - Co. Lit. 185.

\* Husband's right of survivorship excludes her estate but must be diff. now, see Day 228

But now if husband has wife's same power to sever  
joint tenancy, as she had while sole.

ibid.

80.

The husband may also, saving covenant assign  
her chatt. real with consideration & they must  
be set aside by Eq. for husband has nothing to  
do with it, for interest of a chatt. real  
is a legal estate, not so if it is in  
action for an assignment of this wd. be void &  
Eq. wd. set it aside. 1 Vern. 7. 78 (ante 70)

1456. 4. Co. Lit. 201. 3 27. 1. 29. 2 Vern.

## Of the wife's Real estate & Inheritance.

If a wife's real estate & husband has a joint interest in it, but he cannot at common law alien it alone. This power not being necessary to regulate their concerns, & provide for support of the family.

22 ac. ab B. 87. 6. 1. & i. 1. h. 11

1 Rob. 347. 10 Co. 42. 2 Just. 510. 1 Bul. 280.

A wife can & husband & wife alien her inheritance by a joint act, except by fine or recovery, & these are estoppels. 1 B. R. 141. 1 i. m. 647. 2 Co. 515. 13 m. Bar. & Tem. i.

Her inheritance may be aliened by a joint act of husband & wife. 1 H. Cont. 144. 5.

By common law if a husband makes a lease, & dies before termination of the lease, lease expires ipso facto.

But by Stat. 12 Hen. 8th, husband & wife are enabled to make a lease for her life or simple interest, for three lives or 21 years.

Cro. Jac. 22. 278.

1. 22 ac. 301. B. 87. i. 5 Co. 1 2 Land. 180. m. 9

Such leases are therefore valid during the term, though husband or wife shall die before expiration of it.

Cro. Jac. 22. 378. 5 Co. 9. 2 Land. 180. n. 9. 22 ac. ab. B. 87. i. 5.

If a husband having coverture grant a larger estate, 81.  
for his life in his wife's land, there is no forfeiture, as in other cases of tenants for life.

22 ac. 301. B. 87. i. 5 Co. 1. 22 ac. 301. 5 Co. 9. 2 B. R. 274. 9 Co. 140.

If a coverture disables her to claim the estate during his life, & it forfeited to her, the marital right will immediately reattach on it. But it will ensure only as a grant during his life at most, &



probably for life, as if wife may die & he not been  
entitled to courtesy. Co. lit. 320. Bac. D. 37. 2.

Suppose she dies under circumstances sh. wd entitle him to courtesy, can her heir on her death claim a forfeiture? I suppose not, if grant being originally a forfeiture.

On his death, during her life time, her real estate vests solely in her - on her death it vests solely in her heirs.

But if husband, in case of a child born alive & wife, & capable of inheriting if estate, has an estate for life in the whole of sh. she dies seized of, by courtesy of law.

Co. lit. 320. Bac. D. 37. 2. 312. 126. 7. 30

He is entitled to courtesy in wife's Eq. of Redemption, in fee, tho it is only an equitable intst. of sh. there cannot be an actual seisin. "Montgis" 1. 972. 610. "Pas on Mont" 112. 115.

In Gavelkind Tenure, if husband has courtesy with having issue.

Our tenure of land by a charter of Bar. 2<sup>d</sup> is accordingly yt. of Gavelkind, but courtesy, under such circumstances, has never been allowed here, Co. lit. 320. n 312. 128.

There can be no courtesy in a remainder or reversion, for if these if wife wdnt die seized.

To entitle if husband to courtesy, if seisin of wife must be actual - Except in case of some incorporeal hereditaments, & Equities of Redemption.

But it has been determined in Court. yt. actual seisin is not necessary & yt. a right of possession

is sufft. 4 Day. 298.

To entitle y husb. to custody y marriage must be legal, & issue must be born during y life of y mother.

8 Co. 23. Co. Lit. 29. 50. 2 B.R. 127.

1 Bac. 659. 666.

By y birth (not imp.) y husb. is tenant by the entirety initiate, y title is consummated by y wife's death.

2 B.R. 23. Co. Lit. 50.

At com. law arrears of rent, due to y wife while sole, 83. wd. not survive to y husb. on y wife's death.

They wd. go to y Exor. being in y nature of choses in action, belonging to her while sole & not reduced to possession by y husb. 4 Co. 51. a.

Co. Lit. 162. a. b. 251. a. 2 B.R. 495. ante 72. 35

But by St. 32 Hen. 8. they are given to the husband, they vest in him on y wife's death, & go to his Exr &c. on his death.

2 Bac. 17. 1 Ch. pl. 21. Post No. 2 p. 57. ante 75.

But arrears accruing out of wife's property during coverture go to y survivor at C. L. This not being with the above St. 32 Hen. 8.

2 Bac. 17. 1 Roll. 350. 4 Co. 51. Co. Lit. 151. a. 4 Co. 572.

The wife can have no sole & separate property at com. law, except, to some extent, her paraphernalia.

1 P. & M. 103. 1 F. & M. 57. 98. (2 B.R. 77. 96) 1 Ch. 270.

Now a gift to her sole & separate use is protected.

as in Chy. vs. y claims of y husb. 2 B.R. 316. 77.

2 Ves. 191. 603. 1 F. & M. 57. 98. 1 Ch. 270.

Sole prop'ty thus vested in y wife, y husb. has no right to, by custody or otherwise. Over such prop'ty she may exercise as absolute power in Chy. as if sole, unless y. she can't directly devise it if real, by St. 32 & 34 Hen. 8<sup>th</sup>.

2 B.R. 697. 1 P. & M. 103. 1 F. & M. 57. 98. 3 Atk. 391.

P. & M. 103. 150. 150. 1 Ch. 270. 1 Ves. 300. 2 Ves. 191. 603.

How far she may make a disposition by way of trust or power - see Post. No. 40.



The husband can't by his present receipt of gift to, sole & separate use of y wife, tho' he may have common purchases. Co. Lit. 7. 2. 306. 33 ac. 7 & 2. 53 & 7.

10 Bul. 303. 103 K. 556.

For a Descent to her of Real Property. Co. Lit. 356 b.

\* 2 Bth. 272. 3 Com. 619. 33. 8 & 2.

He may spend her ordinary purchases, i.e. her com. law purchases, \* Co. Lit. 7. 536 b.

But after y death of y husband y wife surviving may spend yon or satisfy her purchases tho' y husband actually spent, for she acts as a common host Co. Lit. 7. 126. 347. Co. Lit. 7. a.

Don. 955. Com. 619. 33. 8 & 2. 3.

10p. 919. 251.

And in such case, if after coverture ended she does not make her election, & dies without making election, her representatives have the same right of election. Co. Lit. 7. a.

Real & pers. prop. given to her sole use & for marriage & after co. { 3 J. R. 618. 670. 403  
3 Bth. 397. 200. 6. 49.  
1 Bth. 48. 4. 5.  
1 Bth. 125. 242. 6. 6.

If y husband spends or rather spends & receipts, & receives over them, they are <sup>i.e. her purchases</sup> her own & surviving coverts good. Com. 619. 33. 8 & 2. 3.

The wife can't bind herself by her agent, till after coverture determined.

It has been held, & it is now sole has been supposed of a "Trust Term" & her separate use her interest will vest "pro marito" in y husband.

To every other kind of prop. in her sole & sep- case, she has no right. If not understood <sup>solely</sup> above. \*

1 Ver. 7. 18. 220. 270. 2 Bth. 121. 5 Co. 29.

contra, 2 Bro. ch. 345.

Co. Lit. 7. a. 112.

Voluntary conveyances by a woman before marriage, are sometimes adjudged fraudulent & void in Eq. as vs. y husband. Ex. On y eve of marriage she makes a conveyance with her intended husband privily, to a stranger. 1 Fonth. 2 Com. 17. 2 P. 112. 335. 575. 2 Ves. 264.

See "Fraudulent Conveyances" 16. 85. 18.

85. After is made to provide for her children by a former marriage.

Of the Wife's right to her husband's Estate.

I. In Eng. & Amer. (under st. of distributions 2<sup>d</sup> & 3<sup>d</sup> Can. 2<sup>d</sup>) if a husband die intestate leaving issue, the wife has 1/2 of 3 prop. property absolutely & immediately, in default of a husband being first, &c.  
231k. 515. 2 Bac. 427. 8.

II. Dower, at C. L. a wife is entitled on a husband's death to a life estate in 1/3 of all his real inheritable property of which he was seized at any time during coverture, & which any of her issue shall have inherited.

The husband cannot by any alienation or other act of his, deprive this right of the wife. The wife & husband may join & so it is by fine & con. recovery.

In N.Y. & Mass. she may recover her right to dower by joining her husband in a deed, & in N.Y. she may by his sole act.

There are particular cases in which a husband having covenanted to procure his wife to join in a fine &c. may be compelled in Eq. specifically to perform. 5 Rep. 2. 556. 7 ib. 576. 8 ib. 505. 2 B. M. 189. Amb. 455. Br. sh. 76. 5 N. H. 189. 10 Co. 39. 2 Plowd. 515. 2 Bac. 139. 2 Co. 318.

At C. L. of Eng. may do this with prejudice to her right of dower.

But if any issue which she might have had shall not inherit success. Lit. sec. 53. 231k. 131.

But to entitle a woman to dower she must have been a actual wife of her husband at his death.



In a divorce "a vinculo matrimonii" suits the  
right of Dower but a divorce "a mensa et  
thoro" does not. Dac. "Dow." c. 104. 108.

23bk. 127. Co. Cas. 469. 9 Co. 19. Co. Lit. 32.  
1 Roll 81. 2 Bac. 130. 7 Co. 70. 5th 98.

If a marriage, not being void, was under  
age of consent, <sup>& void after marriage</sup> it is still to be enforced  
as it is not voidable, not void.

But in Eng. by 7 con. law cannot enforce over 9th  
of age.

Co. Lit. 38. 23bk. 101. Lit. 326.

But however far advanced <sup>in age</sup> the married woman  
is still entitled to dower, yet want of  
age might bar her right, tho' great age cannot.

23bk. 128. Co. Lit. 40. 1 Roll. 678.

### Husband & Wife. Book 2<sup>d</sup>

It was formerly held that y. wife of an idiot  
might be endowed, tho' y. husb. of an idiot cd. not  
be tenant by y. curtesy. It is now settled that  
she can't be. Co. Lit. 31. 23bk. 130. 3 do. 127.

To entitle y. wife to Dower, y. marriage  
must have been legal. 1 Lev. 41. 6. 23bk. 126.  
Esp. 175.

The wife's right of dower is paramount to the claim  
of devisees, creditors, & even mortgages when y. mort-  
gage is made after marriage.

The right to the pers. & ppty of y. husb. is op-  
posed to such claim.

23bk. 122. Co. Lit. 31. 38.  
10 Co. 49. 4 Co. 64. 66.

The ground of her preference to creditors &c. as  
to dower is y. her title has relation to y. marriage,

if y<sup>e</sup> husb. was then seized & the commencement  
of such seisin as he obtains, after marriage.

Whereas her claim to y<sup>e</sup> pers. prop<sup>y</sup>. relates on-  
ly to his death.

Seisin in Law by y<sup>e</sup> husb. is sufft. to entitle y<sup>e</sup>  
wife to dower, Co. Lit. 31. Tho' such seisin by y<sup>e</sup>  
wife is not sufft. to entitle y<sup>e</sup> husb. to cur-  
tesy.

For she has no power to restore him to poss<sup>n</sup>.  
when he is wrongfully disseised; but he has,  
however, power to restore her in a similar  
case.

2 R. 131.

In Court. y<sup>e</sup> wife is entitled to right of dower,  
only in y<sup>e</sup> inheritable property of wh. y<sup>e</sup> hus-  
band died seized, or rather wh. he owned  
at his death.

1 Root 39.

The words of y<sup>e</sup> Stat. limit her dower to y<sup>e</sup> inher-  
itance of wh. her husb. died, possessed. 11 H. 7. 146.

By y<sup>e</sup> word "possessed" is in this case construed  
as synonymous with y<sup>e</sup> word "owned". So y<sup>t</sup>.  
actual poss<sup>n</sup> or seisin by y<sup>e</sup> husb. is not nec-  
essy under y<sup>e</sup> St.

1 Root 89.

She is entitled in Court. to  $\frac{1}{3}$  of what inher-  
itable property he owned at his death, tho'  
he died disseised.

In Court. y<sup>e</sup> husb. may defeat her right by  
alienation in his life-time - but not by  
alienation in contemplation of death, & as a  
provision for his family, for this is not any  
thing but a testamentary disposition.

By our St. laws if a man die with-  
issue, & leaves a widow unable to support  
herself, & who has no relation bound to her.



his property in y hands - of his heirs & Legatees  
is charged with her support during her wid-  
ow-hood. This is peculiar to Court.

Eng. wife ent. to cover in y Eq. of  
Redemption of a mortgage made by y husband  
in fee, before marriage. Because this a mortgage  
& yet y husb. in parallel cases is entitled to  
curtesy. But in case of mortgage  
term, she is entitled to cover if y reversion  
is an estate of inheritance. 2 P. Wms. 221.  
19thk. 606. 2 do. 526. 3 P. Wms. 229. Talb. 138. 1 Br. Ct. 50.  
1 Bro. ch. 226.

In Court. & p. 27. tho y mortgage is in fee, she  
may have cover in y Eq. of Redemption  
16th Rep. 59. 6 John. 290. 7 do. 278. Her right in Court  
as in Eng. is param. to yt. of y husband's  
creditors & devisees.

3. The right of cover may be barred in var-  
ious ways. By an adulterous elopement.  
It may, also by a divorce a vinculo mat-  
rimonii. Co. Lit. 22. 3 P. Wms. 276. 1 Roll. 680  
2 23thk. 136.7.

Alienage is also a bar to y right of cover,  
if a citizen here she marry a foreign lady  
she do. not have cover unless by special St.  
when naturalized she may. 2 23thk. 131. 136.

By Eng. law cover is also forfeited by the  
breach of y husb., tho not by felony.  
2 23thk. 130.5.

This is founded on y principle yt y issue  
of y outlawed person is attainted, & they are  
not considered heirs.

This rule can't attain as to breach on st. y United  
States.

By detaining y till deeds of inheritance from  
the heir at law, in Eng. she is barred, until  
she delivers them, & if she deny, detainer, & it is found she  
she is barred forever. 9 Co. 17. 18. Plowd. 85.

& A test. in cover, forfeits her dower, by alien-  
ing in fee or for life of any other, by H. & G. 6 Ed. 1.  
Co. L. 221. Lit. rec. 418. 3 Bac. 230. 2 Blk. 136. 7. n. 279.5

She may also bar her right of dower by ac-  
cepting a jointure before marriage.

Hy. 258. 13 Blk. 172. 2 Blk. 133. 8

"Dower F. 2" 2 Bac. 140. \*

By sleeping <sup>with her husband</sup> a fine or suffering a recovery 4.  
she bars her right of dower, & has her  
opposites by way of estoppel vs. her.  
she is prevented from availing coverture. 10. Co. 48

Bac. "Dower" 3.

In this state a total divorce does not bar  
her right, unless y divorce arises from her  
fault. & also she is entitled to alimony.

& A married woman living apart from her  
husb. with his consent, & with just cause  
is barred by y st. or rather is implied by our Stat.

### Paraphernalia.

The wife is also entitled to certain arti-  
cles called paraphernalia, over & above  
dower, & consist of her apparel, com-  
ments, bedding, trinkets, jewels, &c.

It is sometimes difficult to distinguish y description of property & yet the  
a wife may have to her sole & separate use, arising from numerous many  
facts an examination into wh. wd. tend to perplex.

To Prop. to her whole & separate use, the husb.  
is an entire stranger. She has it to y exclusion of any  
right in him, not so as to her Parapher. - except of y 2<sup>d</sup> class.



Property to her "sole & sep. use" must be so limited, but these words are not indispensable, if y intention is apparent.

34th. 193.

In some cases y intention is inferred not from y terms of y gift or transfer, but from y nature of y prop'ty & circumstances under wh. it was given. 1 Roll. 93.8 yds diamonds plate given by y husb's father to y wife on marriage day, may be held as her sep. prop'ty. & a similar gift of a string of pearls.

But if such prop'ty is bequeathed to her by her husb. & she has no other title, she takes as legatee merely, & it is not to her sole & sep. use, nor her paraphernalia, & is subject to his debts.

And prop'ty given to y wife as ornaments is not her sep. prop'ty in y above absolute sense as vs. his creditors, (34th. 194) but is liable under certain qualifications to his debts.

Paraphernalia is of 2 kinds.

1. Class of Paraphernalia. - y & y paul & bedding
2. " Ornaments. trinkets, jewels. &c. in genl.

Comm. Dig. "Bar. & Fami. Vis."

(Husb's power over these classes is essentially diff.) 1 Roll. 911. 2 Bk. 535.6.

During y husb's life paraph. of y 2<sup>d</sup> class are at his disposal, & acc. to ind. aucts. can't bequeath them, much less those of y 1<sup>st</sup> class.

24th. 77. 2do. 558. 93. 4p. 518

10th. 730. 2 Bk. 436

cont. bro. law. 250. 2333.

(1 Roll. 911. over)

Paraph. of y 1<sup>st</sup> kind can't be taken by creditors, nor can the husb. sell them.

Perk. sec. 500.

2 Bk. 436.

She is entitled to such articles as are suitable to her rank in life, & to one bed at least. 1 Roll. 911.

Comm. Dig. "Bar. & Fami. Vis."

Parapher. of y <sup>2d</sup> class are assets in y hands of y.  
the husb. exec. or adminis. for y payt. of debts,  
but not untill y other assets are exhausted.  
2d. 4th. 395. 10<sup>th</sup>. 11<sup>th</sup>. 370.

Wife's claim is paramount to his representatives & legates. - 10<sup>th</sup>. 11<sup>th</sup>. 720.

y and as land in y hands of one him at law  
is liable for specially debts if y follows, y<sup>t</sup>. if  
y specially creditors take y wife's parapher.  
of y <sup>2d</sup> class, she will be considered <sup>as creditor</sup> in th<sup>e</sup>  
vs. y him, for so much in amt. as those  
creditors have taken of her parapher.

10<sup>th</sup>. 11<sup>th</sup>. 720. 2d. 4th. 77. 10<sup>th</sup>. 380. 369. 93. 2d. 11<sup>th</sup>. 422.

But <sup>if</sup> taken by simple cont. creditors, & shd.  
take them, upon sufficiency of assets, the wife  
will be considered as a creditor in Eq. vs. y him.

2d. 4th. 104.5.

y wife may, however, be barred of her right  
of parapher. as she may to right of, dower.  
ex. settlmt. or jointure. This holds of y debts of  
parapher. 2d. 11<sup>th</sup>. 49. 83. 2d. 4th. 532.

It has been held. y<sup>t</sup>. she has y same right y.  
vs. y devisee of lands, as vs. y heir at law,  
for her claim is preferable to y<sup>t</sup>. of legates  
or devisees.

2d. 4th. 395. 2d. 11<sup>th</sup>. 422.3.

2d. 11<sup>th</sup>. 6. 2d. 11<sup>th</sup>. 720.

But as to devisees is doubtful & is now ques-  
tionable.

2d. 11<sup>th</sup>. 544. n. 1. 2d. 11<sup>th</sup>. 7. 2d. 11<sup>th</sup>. 6.

If y husb. pleads this 2d. sort of parapher.  
y wife, not y executor has y right of Re-  
emption, & if there is a surplus of pers.  
property after payt. of debts - she is entitled to it.  
to redeem y paraphernalia, even to y exclusion of  
legates. 2d. 4th. 395.



The wife's right to redeem property vs. y disposition  
of y husb. is strictly pers. & of course transfer-  
rable or transmissible. To y<sup>e</sup>. if she does not  
claim them as Parapher. her representatives  
cant - & y<sup>e</sup> husb. bequeathed Parapher. of n<sup>o</sup>? class  
to wife for life, remainder to another, y wife  
holds them during life as under y will, not  
claiming them as Parapher. On her death  
they go to y rem. man & not to her exec.  
For as she made no claim to them as Parapher  
y Exec. or admr. cant. 2 Vern. 240. 1 Roll. 111.

bro. Cas. 343-6.

It wd. have been seen had she claimed as Parapher

In Conn. real as well as pers. property is lia-  
ble for all debts & as y Exec. if he shd. take  
y Parapher. for payt. of debts wd himself be  
immediately liable to reimburse y widow, if  
there were other assets.

Qu. Can he take them at all, if both funds  
are exhausted? If he can y widow will be credit-  
or to y ant. of them vs. all y estate of y deceased -  
Real & Pers.

In addition to y widow's usual share under  
y St. of distribution, household goods are to be  
allotted her by St. in Conn. when y estate is  
insolvent. H. Conn. 275. 6. 80. This rule is  
extended in practice to other articles of money.  
Qu. Is it not also extended to solvent estates?

### Husband's liability on Wife's account.

The husb. & wife are jointly liable.

1<sup>st</sup> For her debts. 2<sup>nd</sup> For her torts.

3<sup>rd</sup> For her crimes in some cases.

They are jointly liable during coverture for her

debts, contracted while sole - But  $\gamma$ 's liability ceases on her death unless judgt. has been recovered vs. them before.

For his liability as it grows out of  $\gamma$  relation in wh. he stands to her - ceases with it. 1 Roll. 351. 12p. case 6.

His secus if judgt. has been had vs. them; for  $\gamma$  judgt. alters  $\gamma$  debt, by converting  $\gamma$  original duty of  $\gamma$  wife into a joint duty of  $\gamma$  husb. & wife.

Earth. 30 2d Mod 186 1 Sid. 337. 23p. 122 - 7 T.R. 348. 10 Blk 443. If then she die first, no judgt. having been recovered (not sup.)  $\gamma$  creditor loses his debt, unless assets are left. \*

If he dies first,  $\gamma$  debt survives vs. her. The her exec<sup>r</sup> is not liable -

The principle of  $\gamma$  husband's liability is that  $\gamma$  wife by marriage loses part of her prop<sup>y</sup>. &  $\gamma$  command of  $\gamma$  rest, as well as  $\gamma$  avails of her labour - & thus is deprived of the means of securing herself from arrest & confinement. 7 T.R. 348. 30 Exp. 122.

\* Exp. 122. 10 Blk. 443. n. 30 P. Wms. 409. 1746 68. to L. 351. She ought not to be personally liable to a suit with  $\gamma$  husb.

This applies to  $\gamma$  principle of her liability as to her debts & torts. 1 T.R. 386. 1 Roll. 351. 3 Mod. 156. Fitz. 263.

And hence she can't in any civil action be taken & holden alone on mesne process, for her debts or torts. She must be discharged in  $\gamma$ s case on common i.e. nominal bail. 1 T.R. 386. Cr. L. 355

Comm. 12p. 311 Sid. 124. 11 Mod 149 2 Blk. R. 720. L. 117. Except when action is brought vs. her when sole, pending wh. she marries. She then continues liable to be holden alone; for the suit by her own act defeats a proceeding vs. her. wh. was originally regular, for she was originally regularly held to bail & she can't defeat  $\gamma$  lien of  $\gamma$  creditor.

Law, ac. 323.



In this case execution goes vs her alone & she is liable to be taken upon it alone.

In such case, creditor (Pltf.) may by a "Scieri Facias" obtain execution vs. y husb. & herself with a Scieri Facias. y whole proceeding sh. appear erroneous & not conform to y record. Esp. sig. 128

4 East 501. 3 B.R. 119. 1 Sel. 314

12. If both are taken on mesne process, she is discharged on com. bail & he remains in custody till he puts in bail for both. 2 B.R. 720. 1 Sel. 218. Contra. Vent. 49. For no one it is supposed will become bail or y responsibility of a person having no property at command, nor legal capacity to act. 1 Sel. 315. Bath. 50. 3y Nov. 1760. etc.

If she hold under arrest in violation of these rules or exempt, she may in genl. obtain a discharge in a summary way, by a motion to a Ct. Summing y Process. If necessary by habeas corpus - as when y Ct. is not sitting.

But she will not be discharged in summary way (i.e. on motion) when arrested alone, as Fine sole, in y coverture is notorious. Still if she has in bond or y Pltf. by pretending to be a feme sole. She is left in such case to plead her coverture. 2 B.R. 905/20.

In y application by motion is to y discretion of the Ct.

In y case husb. is an alien, & out of y reach of process. 2 B.R. 780. Bath. 540. 1 N.R. 81. 2 B.R. 81. Pub. 233.

For in such case as y court can't be aided, y Ct. will not upon application to their discretion discharge her. The above Rules all apply to mesne process.

But if taken alone on final process vs. both, she is not discharged, in there is a collusion between y Pltf. & her husb. to keep her in

Prison - This exception is founded in humanity.  
It is never allowed in final process, com. &  
special. Stra. 1137. 1167. Esp. 227. 2 B. Rep. 720.  
1 Wils. 124. (cont. at Liv. 51.)

## II. Husb's liability for Wife's Torts.

14.

The husb. is liable jointly with y wife during co-  
verture, for her torts committed while sole. The  
law is y same if she alone, & with y direction  
of y husb. commit a tort during coverture.

Bro. C. 201. 1 Bac. 287. 2 Bk. 114. Stra. 1237. 1 Wils. 149. 1 Bac. 285. Bro. C. 370.  
Rell. 251. The wife in these cases is y only guilty  
party. They are jointly liable then for her torts only  
in these cases. in Th.; wife both in fact & in judgt. if  
Law is y only guilty person, & he is made liable with her because she  
can't be sued alone.

But for torts committed during covert-  
ure by his command, tho in his absence, or by  
her jointly with him, or in his company, he  
only is liable. 1 Bk. 555. 1 Bk. 25. 1 Hask. 283. 4. Bro. C. 355.  
183. a. 355. 381. 1 Roll. 381. 387.

It is then deemed his sole act, for in these cases  
she is supposed to act from his coercion. Post 70.  
This presumption can't be rebutted. When husb. & wife  
are jointly liable for her torts during coverture, she continues  
so after his death. (Palmer. 313. Bro. C. 200.) 519. But when they are  
liable during y coverture, his liability ceases with y coverture. For in such  
case he is not y guilty person, tho liable with her to be sued for y wrong. Bro. C. 371. 4.

When he is liable alone during coverture, y action  
survives y survivor v. him, y tort being consid-  
ered in such cases as his sole act.

## III. Husb's liability for Wife's crimes.

15.

The husb. is, in some cases, liable alone for the  
wife's crimes. - y as in case of bare theft. or



simple larceny, tho. his coercion or in his presence  
He alone is liable, & act is considered his. Hale 5065.  
20.45. 1 Hask. 4. 4 Bk. 28.

For & coercion, actual or presumed, excused here.  
This is grounded on & law relating to Benefit of clergy  
men being entitled to it & women originally not. (Bk. 29.)

The rule is to be & same as to burglary. 26.31.  
2 Bk. 28. 1 Hale p. c. 45.

But & wife is liable as sole if she commit &  
offence voluntarily, as in & husband's absence & even  
if his bond fire command. Such command falls  
short of coercion. Hask. 4. For were dismembers com-  
mitted by both, she is liable with & husband.  
& husband's presence, coercion, or command would ex-  
cuse her. Relying 31. 4 Bk. 28. 5. 1 Hale p. c. 45. - 10, Red. 60. 285.

4 Bk. 29. 1 Hask. 3. 4. 5.

Why not she excused in a mere misdemeanor,  
as a simple theft, wh. is a higher offence?

Then & doctrine of clergy applies & seems to  
clear & sufficiently, & to indicate yt. her exemption  
in & former case arises out of yt. doctrine. & it takes  
a qual. theory of & law to be yt. & coercion of & husband  
does not excuse & wife. In & above distinction, viz.

4 Bk. 19. m. supra. This doctrine is assumed as & reason  
other exemption it wd. reconcile many inconsistencies & difficulties.

But for higher crimes as Treason murder, & as  
some say robbery committed by both, both are  
liable, tho. & husband used coercion.

For by reason of & enormity of & offence, & supposed  
coercion is not allowed as an excuse - Because these offences are  
supra of clergy & if committed by her alone, she alone is liable.

1 Hask. 4. 4 Bk. 29. Hale 55.

16. If & wife violates a penal st. & husband alone  
is bound to pay for it, tho. she commit & act alone  
& with his civility. The penalty is in nature  
of a debt, see Munic. Law. 30. 54.

She act guiltily as accessory in felony in receiv. No. 2.  
ing & assisting her husb. after fact. tho. a 3<sup>d</sup> Husb. &  
person. In. be, this is founded on y indulgence <sup>Wife.</sup>  
wh. y case shows to their relationship. 1 Hask. 4. 2 Inst. 106.  
1 Hale 44. 4 Bk. 38. 9. 2 Hask. 451.

In all cases to wh. y above exceptions do not  
extend, y wife is liable for crimes, as if sole.  
9 Co. 72. Hob. 95. 2 Bk. 24. Cro. 482.

Of the Wife's power to bind the husb. by con-  
tracts' involving coverture.

Her power to bind y husb. involving coverture  
by her contracts, is st. to be founded on his ap-  
parent express or implied. 1 Bac. 297. Talk. 115. 1 Roll. 301.  
1 Sels. ni. pri. 287-96. 1 Bk. 567. 430. 4 Lev. 32.

The husb. ~~is bound~~ is often bound by her con- 17.  
tracts, when he expressly refuses to be bound.  
as if he refuses to provide necessaries, tho. as  
wife she can bind him for nothing but necess-  
aries. 1 H. Bl. 348. 1 Bk. 342. 1 Lia. 120. 32. 507.

Exp. 122. Talk. 115. Roll 301. 36. 7.

And if he shd. expressly refuse then, y wife  
can bind him.

This assent in fact is not necessary then, in all cases to  
his liability on her contracts. & his dissent will not in all cases  
exonerate him, - for he is under obligations as husb. to pro-  
vide her with necessaries, i.e. food, apparel, medicine  
& such things as are suitable to her rank. Exp. 122. 4.

2 Lev. 4. 1 B. 114. 182. From this duty, law  
implied assent & implication is not rebuttable. Talk. 115. 5 Mod. 259.  
The husb. tho. an infant is bound for y wife's 18.  
necessaries, as he shd. be for his own. Stra. 168. 1 Bk. 767.  
for being bound by y principle with he must be those wh. are in-  
cident to it.

The cases in wh. y wife, may, or y, provide of his assent, 19.  
ind. y husb. are these four. 1<sup>st</sup> Where there is



express agent of y. husb. supra y. contract, 10 Bl. 429.  
4 Co. 109.

2<sup>d</sup>. When agent of y. husb. is expressly given after.  
10 Bl. 429. Roll. 350. Sid. 120.

3<sup>d</sup>. When y. wife usually provides<sup>met</sup> for family,  
& y. husb. pays for them. 10 Bl. 430. 568. Sid. 128.

When there is an implied agent antecedent to contracts of y.  
same kind wh. she afterwards makes.

4<sup>th</sup>. When necessities provided by y. wife, come to y.  
husb's or family's use. then is an implied  
agent subsegt. (10 Bl. 567. 3 East 333)

In y. above cases the wife acts in strictness as  
servt. or agent for y. husb. for if such had  
made contr. they sh. be bound.

1 Salk. 118. 2 Vent. 155. 2 Stra 124.

1 Roll. 351. 1 Sid. 109. 120. 126.

If genl. credit given to y. wife (as in 3 classes of cases)  
cant be determined by any private prohibition, so  
as to defeat y. claims vs. those who afterwards trust  
in y. husb's acct. 10 Bl. 532. 1 Show. 95. 2 Rep. 533.

For credit given by one to another can be  
withdrawn only by notice co-extensive with it.

Secus id. in defrauded. 1 Show. 95. 2 Vin. 673.

If y. wife not having a genl. credit, pur-  
chases clothes witht. husb's knowledge & pays  
them witht. having worn them, y. husb. is not  
liable, for here is no express agent - ante-  
cedent or subsequent. Salk. 118. 2 S. R. 1006.

Exp. 2. 23. Secus had she worn them & aft. paid  
them, for then having come to his use sh. imply  
an agent subsegt. Bacc. Man. & Ten. H.

Upon 7 same ground of distinction, if (with her husband's privity) she pawn her clothes before or after marriage, & borrow money to redeem them, he is not liable for 7 money - Besides - borrowing money is not a contract for necessaries. So it seems of any other article. The rule thus far laid down presupposes yt. 7 husband has been guilty of no neglect, in furnishing necessaries for her. 1 P. 117. 182. 1 Roll 35.

2 Sp. Dig. 122. 2 Jac 283.

If a husband turn away his wife, he is liable at all events for her necessaries, unless she 21. commit adultery. "Contracts." 5 T. R. 506-3. 1 Tel. 290. 1 Bos. & P. 339. 226 n. Stra. 875. 1 Ken. 33. 248. 3 Bos. 2178. 1 Lalk. 119.

Adultery is a sufft. cause (& 7 only one sh. will exonerate him from supplying necessaries) for turning her away - & if 7 husband does it he is not liable.

But in 7 first case, (i.e. when she is not guilty of adultery) no prohibition genl. or special will avail him. The husband consents to her contracts for necessaries.

Lalk. 118. Stra. 1214. or rather - his duty to support her, gives her a genl. credit for necessaries - (Esp. 124.) & 7 Law raises a promise to him to pay for them. 1 Lalk. 118. Stra. 1214.

2 Sp. Dig. 124.

If a man cohabit with a woman, & allow her to use his name as his wife, & appearing so to the public, he is liable for her necessaries, tho' not named - Ergo "not lawfully married" is a bad plea in an action for a Debt contracted by her. Bac. D. & F. 4. 1 Lev. 41. 1 Lid. 13. 54. 387.

1 Bul. ni. pr. 130. Esp. Dig. 124. Lalk. 437.

So in a suit for a Debt due to her, 7 Rule is 7 same. So in action for 7 debts, by or vs. husband & wife. Com. b. 131. Bac. ab. D. & F. 4. 1.

(7 7 contra.)



See Du. On what principle? Can they join as  
Pltffs? "Pleadings" on no principle. If 3 rule be  
true, law gives a right to a man, by a breach of pub-  
lic & good morals.

"Pleadings" 39.

Such a plea is good in an action for Dowry, &  
on appeal - Is it a good defence in an action  
for criminal conversation - See Mansfield says, if  
marriage must be lawful to support sp. action,  
because the charge is of a criminal nature. 1 Lev. 11.  
2 Bul. n. p. 120. 2 Esp. 120. not 4. If y husband & Wife part by ag-  
reement, or y husband allows her a separate main-  
tenance, he is not bound for her necessities,  
after y separation is genly. known in y place  
in wh. he lives.

Whether known or not to y person trusting  
in y place where trust is given, it is not ma-  
terial - It is enough if known genly. where  
he resides.

1 La. Ray. 444. 1006. Salk. 116.

p. 27

Exp. d. 126. 12 Mod. 244. 6 J. R. 607.

Such a separation is a revocation of y credit  
wh. marriage gives her on y husband's account,  
& La. Holt says yt. y credit must be presumed  
to be given to y wife on her own account. But  
whether so presumed or not, y husband is not li-  
able.

it auts.

If y wife living separate, has no separate  
maintenance, y husband is not discharged.

Exp. d. 126. 7 J. R. 2078. 6 J. R. 609.

If y wife elopes & lives with an adulterer, he is not li-  
able, after y elopement is notorious. Salk. 110. & 1 Mod. 171.  
Esp. 125. 12 J. R. 342. 11 J. R. 644. 1 Lev. 8. If according to y current  
op. authorities, he is not liable at all, even if her elope-  
ment is not notorious.

1 Bos. & P. 338. 1 J. R. 647. 706

Exp. 125. 1 Hen. B. 348. La R 444 12 Mod. 244 6 J. R. 603.

For by such an act, her rights as a wife are forever  
forfeited. Hence y husband is discharged forever. 1 B. & P. 339.

And y husb. is not bound to receive her again.

6 T. R. 603. She is he liable for her necessities,  
after refusing to receive her. Stra. 875.

Sec. 2. If he has given her a credit with y pub-  
lic, wh. is not in any way revoked, so far as re-  
gards y knowledge of y public - this is rather too  
much in favour of y husb. - it seems hard that  
he shd. be exonerated, till he shd. be exonerated, till  
he shd. have given notice.

But it seems to make no diff. if y elopement is nota-  
rious, whether it is adulterous or not - he is not liable.

The rule seems to be, y. the husb. is not liable, tho-  
y elopement is not adulterous. 2 Stra. 875. Talk. 118.

1 Les. 5. 2 Esp. 215. 125. 1 B. & P. 339.

If a wife elopes merely & is not guilty of y  
other offence, if she aft. offers to return, & y husb.  
refuses to admit her, he must support her.

2 Esp. 215. 125. Stra. 875.

1 B. & P. 299. 300.

(contra Talk. 118. incomm.)

After a man elopement & offers to return, a genl.  
prohibition do not exempt him from his li-  
ability, but a special prohibition to A. B. & C.  
do exempt him. 1 Les. 4. 1 Sid. 109. 4 B. & P. 2177.

1 Mod. 124. 1 B. & P. 296. B. & P. 339.

If y husb. leave y wife in his absence, in his  
family & in his own house, not having pro-  
vided her with necessaries, he is liable altho  
she lives in incontinency.

6 Mod. 171. 1 Talk. 118. 6 T. R. 603.

1 B. & P. 226. Stra. 647. 706.



But tho' y<sup>e</sup> husb. is not liable, owing an elopement, not adulterous, neither is y<sup>e</sup> wife, for she is still a fine court, & y<sup>e</sup> marital rights are entire. The credit must credit her at his peril.

3 Bac. 297. B. & H. 256. 2. 125. Stra. 875. n. 1 P. & C. 58. 5 J. R. 547.

Obiter & extrajudicial 3 Bos. & P. 338.

(p. 22)

Where y<sup>e</sup> husb. & wife separate by agreement, but not exempting him from providing necessaries, y<sup>e</sup> goods & s<sup>er</sup>v<sup>er</sup>s. shd. not be charged in y<sup>e</sup> declaration, genly. as furnished to him, but y<sup>e</sup> special matter shd. be shown, recy<sup>ing</sup> y<sup>e</sup> cause of action. &c. not be identified, so as to be a bar. (Stra. 127.) 2u. Is not y<sup>e</sup> former more accordg. to legal exp<sup>t</sup>? Is not agreeable to analogy & I can't see its necessity.

24. If y<sup>e</sup> husb. provide properly for y<sup>e</sup> wife & family he has an absolute right to prohibit y<sup>e</sup> public from crediting y<sup>e</sup> wife on his account.

1 Lev. 5. 1 H. 108.

And in y<sup>e</sup> same<sup>st</sup> he may terminate any credit sent. or special sh. he has before given her  
Lalk. 118.

Id. May. 555. 1006.

But he can by no act, deprive her of necessaries, or exempt himself from his liability, if he refuses she may provide for on his credit. 1 Bk. Exp. 122.

If y<sup>e</sup> husb. turn y<sup>e</sup> wife away witht<sup>out</sup> sufft. cause he is bound for necessaries, notwithstanding any prohibition genl. or special. 2 Stra. 1214.

Here husb. is agree for.

3 Day. 37. 58. Lalk. 118-12. 12 Mod. 246.

For money lent to y<sup>e</sup> wife, y<sup>e</sup> husb. is not liable in any case, in actually expended in necessaries, & then only in Equity.

In a Ct. of Chancery y<sup>e</sup> husb. is liable according to y<sup>e</sup> use y<sup>e</sup> wife makes of it, for if for necessaries he is then liable.

As an infant is liable to y<sup>e</sup> value of necessaries bought.

A woman in Fairfield Co. Conn. bit a bill for divorce for "wilful absence" & represented it by proving y<sup>t</sup> she deserted him for y<sup>e</sup> intolerable brutality of his conduct. Sup. Ct. cannot represent.

Lalk. 287. 587.

1 P. W. 553. 2 P. in Ch. 502.

If y<sup>e</sup> husb. & wife separate by deed, y<sup>e</sup> husb. stipulating an allowance for her maintenance, & allowance not being duly pd. he is liable on her contracts for necessaries - (2 N.R. 148. contra Ld. Mansfield.) For here y<sup>e</sup> consideration of his exemption from liability is broken. Tho' Ld. Mansf. did not concur, I think y<sup>e</sup> other Judges fairly demonstrate it.

### Of y<sup>e</sup> Wife's power to bind herself & Prop<sup>y</sup>. by her contr<sup>s</sup>.

The genl. rule of y<sup>e</sup> com. law <sup>she</sup> can subject neither y<sup>e</sup> person nor y<sup>e</sup> Prop<sup>y</sup>. for her existence is merged in his, so yt. she has no will distinct from his. 10 Co. 42. 1 Roll. 357. 1037. 442.

It does not seem necessary to resort to so technical a reason, for y<sup>e</sup> true principle of y<sup>e</sup> rule is 1<sup>st</sup> as y<sup>e</sup> Law has in favour of y<sup>e</sup> husb. deprived her of her prop<sup>y</sup>. or disabled her to dispose of it, hence she is privileged vs. all personal liability.

2<sup>d</sup>. The husb. has a right to y<sup>e</sup> person of y<sup>e</sup> wife, & if she d<sup>d</sup>. bind herself, y<sup>e</sup> right might also be infringed.

3<sup>d</sup> - If she d<sup>d</sup>. affect or subject her Prop<sup>y</sup>. his right to yt. might be defeated. ante 12.

It is presumed yt. in all cases she acts under y<sup>e</sup> husb. coercion, & seems to formingud. no part of y<sup>e</sup> true reason of y<sup>e</sup> rule. For if she enters into a cont. voluntarily vs. his will, it certainly wd. bind neither him nor her.

Her contracts at C.T. were not regularly voidable merely, but void <sup>if authorized</sup> <sub>by</sub> <sup>her</sup> <sub>husb.</sub> 10 Co. 42. 1 Talk. 7. 2 P.W. 144.

203k. 227.

But a redelivery of her d<sup>d</sup>. or bond, after her husb. death, or wh. is equivalent to it, will bind her. This being a re-execution virtually, so yt. in law tis a new deed. In every case takes effect from delivery, i.e. from y<sup>e</sup>



date of y<sup>e</sup> last delivery - It is not valid "ab initio" but from  
y<sup>e</sup> redelivery. Coep. 201. 1 Cruise & 20.

Her leases, however are only voidable. This excep-  
tion to y<sup>e</sup> genl. rule is allowed for y<sup>e</sup> advancement of  
agriculture. Coep. 202. Doug. 34. J.R. 775. 20. 11. 127.  
1 J.R. 478. 1 Phill. 1st.

And if she joins y<sup>e</sup> husb. in a lease of her lands,  
for a life or more than 21 years, & accepts rent  
after his death, she is bound by y<sup>e</sup> lease, for  
she thins affirming it. The husb. can avoid the  
lease tho she can't owing covert. for y<sup>e</sup> avoid-  
ance wd. be of no greater authority than y<sup>e</sup> lease  
itself. 2 Saunders 180. n. y. ex. car. 303.  
1 Roll. 225. 1 Phil. 45.

In this case, however, after she becomes dis-  
covert, she may ratify or annul it, as where  
she leases alone. 1 Roll. 349. 1 Roll. 225

It being as to her voidable. 1 Saunders 180.

If she ratifies it, she becomes bound by the  
contract, for she ratifies it "ab initio."

1 Cruise & 20. 1 Roll. 291. Coep. 534. 2 Saunders 180. n. y.

If a lease be made to husb. & wife, & she ag-  
rees to it after his death, she is liable on such  
of the contracts as are run with y<sup>e</sup> land, tho not  
upon such as are collateral wh. charge the per-  
son.

1 Roll. 349. n. 2 Saunders 180.  
1 Phil. 45.

If an obligation be given to Baron & Feme; she  
may refuse the benefit of it after husb's  
death, & after such waiver, it enures to his  
representatives, as an obligation to him alone.

1 Roll. 347.  
See "2nd" 31. 1 Saunders 180. n. y. ex. car. 303.

If a husb. & wife are made tenants in com.

she may disagree to the purchase or gift after  
his death. 1 Roll. 349. 3 Co. 26. & when waived, it  
will enure as an estate originally conveyed  
to husb. - for by the waiver, it is waived  
as to her "ab initio?" 3 Co. 207-8. 1 Roll 349.

Comm. Dig. "23 & 24."

But if y estate is a Freehold, a waiver by  
parol is not effectual; she must disagree in  
a Ct. of record. This is necessary by reason  
of y laws seeming so highly of a Freehold.  
3 Co. 26.

On y other hand, she may assent to it by  
parol, or by her acts, - as entry & taking y profits.

If an estate is limited to husb. & wife & a str-  
anger y husb. & wife take but a moiety. How  
y husband & wife are regarded as one grantee.  
This is in consequence of their legal unity.

Tit. sec. 271. Co. Lit. 247. B. 257. 8.

If real estate is conveyed to husb. & wife, by  
words sh. between strangers wd. create a joint-  
tenancy, they will take by entireties & not by  
moieties, & are called quasi joint-tenants, each takes  
whole, as is possible in law. 5 Pl. 26. 584. 2 Lev. 39. Co. Lit. 187 a 36. 9 Co. 146

Engo, y husb. can't by his own act alien even  
a moiety or sever even a joint-interest. He  
can't they deprive her of y chance of taking the  
whole by survivorship. They may dispose of it  
by joining in a fine or com. recovery -  
This rule stands on y same principle with  
the former. (see "entireties in joint-tenancy" p. 8.)

The wife may convey lands limited to her  
on condition yt. she wd. convey them to another.  
This is allowed to prevent forfeiture of her int.



est. The law court allow her to convey away what she does retain, but what she does not retain, & by the conveyance of wh. she does not be injured. 4 Cruise's reg. 21. Com. dig. "D. & F." p. 1. & 3.

Since wh. has allowed a feme sole to hold separate property. She may now by her court and property thus retain, even while living with her husband. 12th. 90. 1. 102. 1 Ves. 517. 6 Br. P. C. 156. 103. Ch. 10. This is an anomalous estate at c. l. & has a rip take quasi ft. lenti. 12 N. R. 162.

But her court does not bind her at law, & if course no person is not able to arrest upon such contract. She is bound only in eq. not at law. 12 Ves. 190. 2 Atk. 379. 103. ch. 18. 1 Br. 103. 12 N. R. 144. 1 Hen. 381. 2 N. R. 1.

But wh. does not bind her to these contracts by becoming in personam, it does only "in rem".

And tho' property is here in separate use by trustees she is the owner & may dispose of it by gift, with their consent. in there is a condition that they shall join her in a deed. 12th. 100. 1 Ves. 517. 2 Ves. 290.

1 J. M. Court. 601.

1 Br. 6. 17. 19. 20.

She may convey because her equitable interest is independent of them.

If her husband is banished or a convicted felon she is considered as feme sole for he is civilly dead, so if he is transported, or is an alien enemy.

25. 7. 127. 1d. R. 197.

1d. 299. 300. 1d. 231. 232. 116. 2d. 104. 1. 303. 8. R. 257. 1 Hen. 381.

1 R. 75. 77.

In these cases she may sue alone for she is a feme sole in law. For there is no gift.

reason of treating her as a quene sole, & alt  
capacity to act for herself is necessary to keep  
her from suffering. She may sue & be sued & answer.

The rule is y same in a divorce a mensa et  
thoro. 1 Dou. 666. 2 Esp. R. 587. Esp. Dig. 127. La. R. 147.

1034 Pol. 231. Talk. 116. 656. Del. 297. 300. 1950s. & Pol. 357. 1 H. 336. 346. 2 Ann. 104.

The rule has been held where y husb. has  
been a long time a foreigner, but not now.

1 B. & Pol. 357. 2 D. 234.

11 East. 304. 2. 1. S. R. 80.

(*Millon vs. Apple*.)

The case of Corbett vs. <sup>Polanette</sup>~~Colanette~~ has gone fur-  
ther in C. law in subjecting y wife.

This case is now overruled 8 T. R. 555 5 T. R. 682.

8 T. R. 605. 4 D. 200.

2 N. R. 148. <sup>163</sup> 650. Rep. 0. 1030. T. R. 377. 2 B. 1079. 1175.

In y case of Barwell vs. Brooks, y wife alone  
was held liable at Law for necessaries, & in fur-  
ther, but in y case above she did bind her-  
self to y extent of her costs.

Cook's bank. law. 248

Another case "Lady Lanchester's case" y husb.  
lived in Ireland, y wife in Eng. & sep. by vic  
had taken place, & a sept maintenance was  
secured. She was held liable on y ground, yt.  
her husb. lived abroad & yt. she traded as a  
quene sole. 1 R. 100. 78. Esp. Dig. 126. 2 B. 1057.

These cases have been overruled by the  
highest authorities & are not considered law.

1030s. & Pol. 357. 8 T. R. 545. 11 East 301.

2 B. & Pol. 226. 2 East 576.

1 Sel. 277.

It is now sep. real prop. liable in Eq. nly agree to  
y man separate maintenance with out her <sup>that effect</sup> <sub>of her</sub>

1 T. R. 517. 1030. Ch. 16 4.



that is an agreement respecting  $\gamma$  property itself, not for  
her debts, or personal engagements. 1 Ves. 517. 1 Br. Ch. 16  
2 N.R. 163.

But her sep. pers. prop. &  $\gamma$  rents & profits of  
her sep. real estate may be applied by a Ct.  
of Eq. in discharge of her genl. engagements, as  
in discharge of a bond note &c. 1 Br. Ch. 201. 8,  
where never is pers. vs. her, i.e. never acts in personam, but vs.  
her prop. only.

In these cases a Ct. of Eq. is  $\gamma$  only Ct.  
in wh. these debts can be enforced.

8 T.R. 547. 1 Bos. & Pul. 183.

But a feme cot. living sep. with her sep. prop.  
was never held liable on her debts, either in  
Law or Eq. The husb. is bound to support her, & to admit  
that wife is bound, is to exonerate  $\gamma$  husband.  
5 T.R. 682.

4 T.R. 766. 5 Do. 605.

But, as before, a married woman living sep. from  
her husb. on account of adultery has been held  
(aliter) liable on her own debts 1 B. & P. 338. see qu. ante.  
so in 24th, the court implies  $\gamma$  antient Law.

But if a feme cot. alone brings a fine or  
suffers a recovery she is bound by it tho  
the husb. may defect it during her life  
(or aft. i. tunc. by curtesy) or entry.

2 Br. Ch. 386. 10 Co. 49.

1 Fent. 200. 7 Co. 8

1 B. & P. 22. 1 H. B. 291.

one is estopped by  $\gamma$  recovery, tho some have doubted  
if she d. binds herself by recovery. Co. Lit. 326.

1 Hen. 381. 341.

And aft. husb's death she  
is bound by  $\gamma$  recovery in  $\gamma$  fine, he not hav-  
ing defeated it. If she do. be bound during co-  
verture,  $\gamma$  marital rights do. be infringed

1 Sid. 466. 1 Ch. Pl. 43.

If the husb. joins in a fine or recovery, his  
binding on both "ab initio" 10 Co. 42. 1 Bos. 202.  
She is bound by way of estoppel. 2 Roll. 395.

These were & only conveyed by wh. in her  
cont. Ed. alien her inheritance at c. l. but can  
now be executed a power over a use.

First by executing a power over a use at Law (2 J.R. 695)  
wh. operates at law as well as in Eq.

Second. In Eq. she clearly may, as also by a declar-  
ation of Trust, tho. there is only an agreement made be-  
fore marriage, for settling & estate upon trustees; sub-  
ject to her appointment or declaration. The second mode  
can be enforced in Eq. only. Ros. 7. 150. 1 Atk. 300. 2 Ves. 75. 191. 610.

6 Br. Par. cas. 156. 1 Hen. Bl. 336. 2 J.R. 695.

In & former cases, i.e. where there is an actual  
settlement made in Trust, & Trustees or persons, to whom  
estate was first conveyed, are compelled in Chy.  
to carry her appointment or declaration into effect  
by joining in & necessary conveyance for yt. purpose.

Ros. 150. 1 Atk. 300.

In & latter case other necessary parties, as the  
husb. or & wife - her at Law (as & case may require,  
are compelled to do & same thing.

\* (2 J.R. 695. 6 Atk. 1120. 1 Hen. Bl. 336. 6 Br. Par. cas. 156. 2 Ves. 75. 191. 610.)

If & wife, having separate estates, permits & husb.  
to receive & use & rents & profits, if it is real, or &  
interest. if it is personal, she is presumed in Eq.  
to have abandoned & rents & to him. 1 Atk. 69. 1 Ros. cont. 322. 3  
2 J.R. 82. 1 Ves. 191 (6 Br. Par. cas. 150. 158. 2 J.R. 695.) 1 Bos. & Pul. 192.

& to devising pers. property. see 2 Blk. 398.

\* (1 Atk. 237. 2 Ros. a. 100. 31. 2. 100. 80. Lach. 11. 135. 138. 2 Ros. on rev. 166. 7. 2 Ves. 191.)

A feme cont. can't devise Real estate under & genl.  
words "all & every person or persons" in & St. 32 Hen. 8<sup>th</sup>

This was & rule before & explanatory St. 34 Hen. 8<sup>th</sup>  
& by yt. St. she is expressly disqualified. This  
rule seems indeed to be founded on & presump-  
tion yt. she acts by coercion of her husb. For he has  
no interest in her inheritance, & & power of  
devising it c'd. not subject her person, & of course  
c'd. not violate & marital right. 44. 354. 6. 2 Ros. 1405. 2 Ves. 2

\* (acc'ts. relating to wife's executing use.)

440. 225. 1 Ves. 300. 4 Co. 51. 6.

2 East 556.



## The Wife's Power to Devise.

By our St. of Court. all persons of full age & right understanding & not otherwise legally incapacitated, shall have full power, to make their wills, Testaments, & other alienations of their lands & other estates.

St. Court, "age & ability of persons" 1

As to the meaning of the words "legally capable" note the construction given to the words "all persons" in St. 32 Hen. 8. Provis. 11. i.e. persons capable of disposing of real property by other modes of conveyance before known. Provis. 11.

It was once decided in the Ct. of Errors in Court, yt. she might devise real estate under the genl. law authorising devises. But it has been since determined contra. Rebl. 195. 428. 2 Day 102. Under our new St. she is expressly empowered to devise (St. 10. 15.) & in genl. she can't make a will or bequeath personal property. Kirk. 193. 428. 2 Bl. 498. 4 Co. 51. 2 East 552. For it wd. violate his rights. 7 Stra. 881. Cro. L. 276. 1 Mod.

Devises of goods wh. she holds, as Executrix, "in articulo mortis" i.e. she makes an devise of them without husband's consent, but she can't even with his consent bequeath them, making an execution of them, is no more yr. executing a power over them. 2 Bl. 498. 2 East 552. Gessoppin 1101. 201. Offic. Cur. 196.

In Eq. she may bequeath her pers. property holden to her sole & sep. use. She is a feme sole in Eq. "quoad hoc". She can't do this at C. L.; for y. C. L. knows nothing of property holden to her sole & sep. use. & not being enabled up to yt. by St. 35. Hen. 8.

It has been so. yt. she may bequeath her paraphernalia. 4 Reeves His. Eng. Law 72. 4.

But she may bequeath any kind of pers. propy. held in her own right, in wh. she has y beneficial interest, with his consent, but whether y goods were originally his or hers, it is his consent that gives y consent, - his consent is y operating - bequeathing act. 1 H. Bl. 357. 1 Glod. 211. 3 Atk. 635.

1 Revue Hqs. Eng. Law 101. 111. 207. 2 D. N. 82. 316. 1 Fern. 255. 250. 253.  
4th. 73.

That y husb's consent gives validity to the instrument - see 2 Bl. 498. 1 Mod. 211.

But his assent of a bequest of pers. propy. wh. may accrue to her after his death, will be of no avail, tho she survives him, for he has no power over hers. The is therefore void. 2 East 552. This proves yt. it is y assent of y husb. yt. makes her will of pers. propy. valid.

If a fem. sole makes a will & afterward marries & dies before y husb. it is revoked. For it is essentially incident to a will to be revoked by y act of y party or testator. But her power to do ys. being suspended by marriage (for if revocation during coverture wd. be void) y law revokes it for her, for y law will not allow ys. ambulatory instrument. to remain in force.

2 P. Wms. 624. 4 Co. 60. 2 T. R. 695. 2 Bl. 499.

But if she survives y husb. how is y rule? The opinions are contradictory - The weight seems to be in favour of y revocation - I think it wd. be revived.

2 Bl. 499. n. 2 T. R. 689. More 381.

Pos. rev. 173.

see Devise 155.

And a will made, a fem. coot. is not by y Eng. Law validated by y husb's death, for if not good in its inception, it never can be, same rule as to all contracts. 2 East 552. collateral events can never give validity to yt. wh. was originally void. Pos. rev. 172-3. 2 East 552.

sa. K. 258 Holt 245. 2 Bro. 343.  
114. 108. 123. 1 Eq. cap. 171.



35.

She may execute a naked authority, for here no interest of hers can be affected - as a bare power to sell another's property. *Co. Lit. 112. a. x.*

4 *bu. & 21. 236. 7.* *Com. Dig. 23 & 24. 9. 2.*

4 *bu. Dig. 21. 233*

To also that an interest, joined to her with the power, provided & authority is collateral to & interest & not flow from it. They are then unconnected as if granted to diff. persons.

36. To devise to her of an interest in trust to convey to another, or on consideration of her conveying - here she is bound to convey & by conveying binds with no interest wh. She has a right to hold. *Co. Lit. 112. a. n. 6.* *bach. 189.* *132. & 133. 192.*

*7. 11. 11.*

4 *bu. 236. 7.*

*236. 40*

either - if & power arises out of her interest as devise to her in fee with power to convey.

1 *236. & 237. 192.* In this case

if she do execute & power, she do dispose of her own beneficial interest, *post. 40. 44.* *ante no. 1. 238. 3.*

10 *res. 3. 446.*

But I conclude she may convey it in fee, as sep. property independently of & power. *act. 236.*

*236. 40.*

40.

She may however execute a power or authority retained by herself to convey, or even virtually to devise her own estate, - if & estate is settled on her by way of trust or use.

In & former case she may effect & obligation by declaring & trust, in & latter by executing a power over & use. If & trust or power is to be created during coverture, it must be fine, if ante marriage it may be by deed.

As an estate of a woman conveyed to & use of herself for life, *rem. to & use of persons*, as she by any

writing in y nature of a will shd. appoint.

By way of trust she can dispose of her real propy. in a similar way, as an estate of a woman conveyed to trustees in trust for her separate use during coo. & aft. in trust for such persons as she may appoint. But y trustees (in Eq.) will be impelled to convey or carry it into effect. Bos. D. 150. 65. 2 D. R. 695.

1 Rep. 191 1 Bos. & P. 191.

And it seems she cant devise or execute a power by devise ~~over~~ her real propy. in one of these ways; for y rights of her heir at law are concerned & she has no legal ability to convey, 2 Ves. 192. 2 D. R. 695. Bos. D. 149. 50

(see 2 D. R. 598. n. Bos. D. 166. 7 2 Ves. 191.)

At C. L. she cant hold y propy. as sep. The agreement in this case makes it sep. propy.

But a power to convey by deed y propy. of another, she may execute witht a Will. P. dig. 31. 2. May. 80 Leach 11. 135. 9. Talk. 239. Tho. she cant execute a power over her own interest, 103. & 0? 182. For y first case she is a mere agent for passing y others interest.

Bos. D. 150. 65. 2 Rep. 190. 2 D. R. 695. 6 D. R. Cas. 136.

63. 5. 80. Leach 11. 135. 9.

1<sup>st</sup> She may dispose of her real propy. by executing a power over a Will. Suppose a woman before marriage conveys her real estate to H. D. to y use of herself, for life, rem. to y use of any person or persons, she shall by any writing in y form of a deed or will sh. appoint. If we all she has to do, is to make a will in form appointing her children, or any persons, y remaindermen. She reserves while sole, a power to convey to whom she pleases.

When she makes y appointment y appointees are in virtue devisees; but she dont in form convey y estate, for sh. is sholly out of her. Nominally having reserved to herself only a life estate & a power to appoint any person or persons to take y use in remainder. She exercises a power over a fee-simple wh. she conveyed away while sole.



Agreement between Mrs. J. W. & Wife.

Co. Lit. 112.263. Co. C. 551. 1831. 552.

The true reason seems to be, that

Second. It is a recovery if attained  
So in most cases a negating of reason & rights  
of husband & wife property. Thus if he do. have  
a recovery vs. her, it do. in general be out of wh.  
if essentially his own, & she might make his  
own by his own by his acts. If she do. recover  
vs. him. she might recover, & ipso facto,  
become his either absolutely or partially.

Besides. Thinking the society of y<sup>e</sup> G. L. want a law suits

between them. Hence if a wife of a deft. becomes ex-  
ecutrix or administrator to y<sup>e</sup> P<sup>l</sup>ty. y<sup>e</sup> action is destroyed.  
1 T.R. 507.

So if y<sup>e</sup> deft. in y<sup>e</sup>s. case. had been taken in exe-  
cution by y<sup>e</sup> original P<sup>l</sup>ty. he must be discharged. For  
his wife as executrix has now become a creditor. But  
she cannot hold him in execution, & besides y<sup>e</sup> trust  
during coverture devolves upon him; so yt. he him-  
self has y<sup>e</sup> legal right of credit, at his control. -  
But there are some exceptions to y<sup>e</sup> genl. rule.

### Contracts of Husband & Wife during coverture.

At C. L. no contract between Husband & Wife res-  
pecting pers. prop<sup>y</sup>. is valid, for y<sup>e</sup> reason before  
assigned & indeed y<sup>e</sup> C. L. don't recognise a right in y<sup>e</sup>  
wife to hold pers. prop<sup>y</sup>. independently of y<sup>e</sup> husband.

1 T.R. 9. 1 W. Bl. 336. 45 C. 1 Rev. C. 84. book. Dkt. law 25.

And a deed of land from y<sup>e</sup> husband to y<sup>e</sup> wife directly wd.  
at C. L. & according to y<sup>e</sup> ancient rule of Eq. be void  
by reason, not of y<sup>e</sup> husband's right to her prop<sup>y</sup>. of wh.  
y<sup>e</sup> control & "inquisition" wd. still be in him, but by reason  
also, of y<sup>e</sup> impossibility of any coercive remedy between  
them. For y<sup>e</sup> law knows of no right w<sup>th</sup> a remedy.

Besides y<sup>e</sup> C. L. don't recognise y<sup>e</sup> separation of rights  
& interests between ym. sh. a contract respecting prop<sup>y</sup>.  
implying. Co. Lit. 3. a. n. 1. 112. 1 Rev. C. 84. 4 Co. 29.

But tis now settled in Eq. yt. husband may settle  
prop<sup>y</sup>. to y<sup>e</sup> sole & sep. use of his wife during covt.  
even w<sup>th</sup> trustees. 1 Hon. 84. 6. 19th. 270

2 D. 112. 306.

And her agreements respecting y<sup>e</sup> prop<sup>y</sup>. even with y<sup>e</sup>  
husband are binding. For Eq. can act upon &  
contract y<sup>e</sup> prop<sup>y</sup>. w<sup>th</sup> invading y<sup>e</sup> pers. relative rights



of either party. 2 Rep. 669. Br. Ch. 44. Ven. 64. 19th. 270.  
10. 116. 126. Br. Ch. 16. 1 Fent. 90. 1. 102. 2 Mass. 152.  
Rox. 8. 610. 1 Kay. 221. 35. 6 Br. P. C. 156. 2 Rep. 191. note 1 Rep. 163.5.  
2. 14. 72. "Dowry 51

(Whit) y<sup>t</sup>. she can't hold prop. prop. to live separ-  
ate use.

But it has since been decided scilicet by Ct. of Errors.  
Dow. Chy.

It was formerly holden y<sup>t</sup>. Trustees were nec-  
essary.

... It. conveyance of real prop. by husb. to 3<sup>d</sup> per-  
sons to y<sup>e</sup> use of his wife is good <sup>at C. L.</sup> <sup>at C. L.</sup> For Com.  
law regards only the legal title, & Eq. w<sup>d</sup>. carry y<sup>e</sup>  
uses into effect. 2 Br. 337. 332. 4 Co. 27. Co. Lit. 320. 116. 1 Br. 337. 170.  
Whit. since y<sup>e</sup> It. is used, because y<sup>e</sup> legal title  
rests in y<sup>e</sup> "cestui que use" so y<sup>t</sup>. a conveyance for y<sup>e</sup>  
use of y<sup>e</sup> wife w<sup>d</sup>. be a conveyance to y<sup>e</sup> wife, wh. at  
Law can't be.

So if y<sup>e</sup> husb. to encourage y<sup>e</sup> industry of y<sup>e</sup> wife, en-  
gages to allow her a part of y<sup>e</sup> avails of it, y<sup>e</sup> agree-  
ment is good in Chy. 3 Br. 11. 337. 1 Fent. 42.

She may sue y<sup>e</sup> husb. in those cases, by next fr.  
iend in Chy. 14th. 278. 3 Br. 11. 446. 2 Eq. cas. 130.

1 Fent. 87. 99. 2 S. 92. 169. 168

"Donatio causa mortis" from husb. to wife is good  
at Law for it is testamentary. 10. 116. 141. Co. Lit. 320.

If y<sup>e</sup> husb. covenants with y<sup>e</sup> wife, not to intermed-  
dle with her estate, he is estopped from doing it  
& he is left to her contract - i.e. she may obtain  
an injunction vs. him in Eq. 14. 236. 334. 341. 51.  
2 Br. Ch. 377.

Articles of agreement between husb. & wife, to live

separate, are enforced both in Eq. & at Law.

Fent. 105. 174 M. 334. 351. 3 Br. Ch. 614. 2 D. 377. 1 Burr. 432. 8 Mod. 22. 2 Vern. 386. 671.

If then in violation of y agreement. he compels her to live with him again, she may be discharged by a Writ of Habeas corpus. Stra. 478. 1 Burr. 542.

Comm. 913. Bar. & F. 8.

For neither y person or propy. of y husb. is injured by a "habeas corpus" nor does it interfere with any marital right, wh. he has not relinquished, & if after he repeats y attempt, he is guilty of a contempt.

He is bound tamen only to y extent of y agreement. ergo any propy. after coming to y wife, will be as much at her disposal, as if there had been no separation, unless y contrary has been expressly stipulated. Bac. "B. & F. 8." 1 Vern. 261.

A voluntary settlement by husb. on wife after coverture, is good w. even subsequent purchasers, knowing y facts, as being fraudulent by St. 27<sup>th</sup> Eliz.

Q. Is this correct on principle? knowing the fact, & being voluntary purchasers, how do they be defrauded by y settlement. if established? "In Conveyances".

### Contracts between Husb. & Wife before coverture.

It is regularly true, yt. if y husb. is indebted to y wife before coverture, or vice versa; intermarriage extinguishes y obligation.

1036. 442. Bro. Car. 551.

If y husb. being indebted to y wife by bond executed, ante marriage, dies & leaves y bond uncollected, y debt it seems, will not revive; For a pers-



mal contract, once suspended, is never extinguished.  
or, a pers. right of action, once suspended, is never extinguished.

1031. 442. Cro. Car. 551. 2 H. 336. 10 Hobt 10. 2 P. m. cat. 254.  
If y obligee in a bond, being a woman, marries  
any of y co-obligors, y whole debt is discharged, &  
"e converso". Cro. Car. 551. 1 T. m. 93. Com. L. 23 & 24. L. 1.

1031. 442.

The principle of this rule is, that a marriage is  
a discharge of all y debts y<sup>t</sup>. might have been  
due from y obligor. she marries. But y whole  
debt might have been due from him, ergo  
y whole debt is discharged. Salk. 325. 6. 1 T. m. 90.  
Hob. 210. Cro. Jac. 541.

Under y genl. rule, a distinction is taken between a  
contract y<sup>t</sup>. creates a duty during coverture, & one  
creating a duty after it has ceased. A contract or  
promise by y. h<sup>u</sup>sb. before marriage, to leave the in-  
tended wife a sum of money after his death, is  
allowed to be good at Law, as well as in Eq. Be-  
cause there is no debt during coverture, for y con-  
tract is made before coverture & does not create an  
obligation till after. Hence there is no difficulty  
about a remedy, or invasion of y marital  
rights.

Ld. Holt was opposed to this rule, but he was  
overruled by y other Judges & his now well es-  
tablished.

As to a bond executed by a man before covt-  
conditioned to leave his intended wife a sum of  
money after his death, there has been much  
diff. of opinion, whether it is not discharged  
at Law by their subseqt. intermarriage. The  
penalty being a present debt.

That such a bond is good in Chy. as to y agree-  
ment. There has been no doubt. 2 O. W. 243. 2 Vern. 480.  
29 Hk. 97. Pr. Ch. 237. 2 Vent. 243. 290

And such a bond was holden valid in Lord Holt's time (Holt himself, contra, tho' overruled by the other Judges.) Co. Lit. 511. Com. Rep. 69.

2 D. 116. 243. 5 T. R. 382.

The great weight of Lord Holt's opinion rendered the rule extremely uncertain, till Lord Kenyon's time. When it was unanimously settled by all the Judges.

It is now good at Law.

5 T. Rep. 383.

A wife may by accepting a jointure before marriage bar her right of Dower, i.e. at Law. Such an agreement was never considered as extinguished by subseqt. intermarriage.

A wife's estate does not take effect till after the <sup>coverture</sup> ~~contingency~~ is determined. And to enforce the contract either in Law or Eq. requires no suit between husband & wife. Co. Lit. 36. 4 Co. 182.

1 Bulst. 173. 2 D. 137. 5.

The Eng. Law as to barring Dower by jointure is regulated by the Stat. of Uses. 27 Hen. 8<sup>th</sup>.

### Requisites of jointure to Bar Dower.

These are four.

First, it must take effect immediately on husband's death.

Second, It must be for the life of the wife, at least, & not "per antea vie".

Third, It must be settled expressly on the wife herself, & not in trust for her.

Fourth, It must be expressed to be in satisfaction of her whole Dower. On this subject there is a contrariety of opinion. But I think the weight of authority is in favour of the rule laid down & it, fact may be avoided.

Co. Lit. 36. B. 2. 2 D. 135. (Contra 4 Co. 30.



Unless these requisites are complied with, in settling & joining, & right of wife to dower out bar-  
red, tho' still & jointure is not void, but with  
them it will not bar dower.

45. It has been doubted whether a jointure in  
County may not consist of pers. prop. (ante 3)  
then some other estate for our H. must mean  
a larger estate than for life. St. Court. 132. R  
That it can't see *Fairfield Co. 1801. Sellick vs. Sel*

But an executory agreement by wife before mar-  
riage, to accept pers. prop. for money in lieu of  
dower may be enforced in Eq. For Chy. can  
repose upon & adequateness & reasonableness so  
as to guard her vs. loss, & won't interpose to  
remedy injustice. "Parent and Child" 41. 1 Ves. 35.

2 Eq. cas. 101. 2.

1 Bro. 6. 53. & Bro. Pl. 370.

If a jointure be settled upon a woman, she  
may on husband's death accept or refuse it & take  
dower. For & settlement being made, wife can't  
take her. But she can't have both. 2 Bl. 138.  
20. 140. Bulst. 137. Eq. 258. And by bringing a Bill  
of dower she waives & jointure. Com. & "B & F" 1. 4.

3 Co. 27. a. 4 20. 5 v.

Where she has a devise, she takes devise & dower  
both unless & devise is expressed to be in bar  
of dower, i. e. fully.)

But if & husb. has devised all his other prop.  
except & devised to her, tho' it isn't expressed to be  
in bar of dower she can't take both, this  
being proof upon & face of & instrument, of his  
intending & devise as a substitute for dower.

Co. Lit. 128. Id. May. 538.

'Tis now a genl. rule, y<sup>t</sup>. marriage settlement, 1808.  
agreements made between husb. & wife ante marriage, Husb. &  
are binding in Chy. on both parties. 1 Bos. & 444. Wife.  
220. 235. 2 Vin. 480. 93. 1 Fent. 47. 93. 5. 2 Gth. 97.

### Husb's right & power over the person of Wife.

If y<sup>e</sup> wife is injured in her person, and the  
husb. sustaining a consequential damage, he  
has a sole right of action vs. the wrong Doer.  
as by Battero. False imprisonment. Harbinger.

The action must be laid in y<sup>e</sup> case with a "per  
quod servitium or consortium amisit". Chy. Pl. 374.

1 Loe. 346. Bro. J. 501. Bro. C. 89. Tolk. 206.

Ch. Pl. 265. 1 Sw. 140. Com. D. 73 & 74.

So for Crim. Con. with y<sup>e</sup> wife, y<sup>e</sup> husb. has his ac-  
tion. 4 Bwe. 2057. N. & D. 37. 8. Doug. 162.

The precedents of this action are laid in Trespass.  
2 Ch. Pl. 265. 'Tis however in effect, an action on y<sup>e</sup>  
case. 6 East 387. 9. This is clearly a departure from  
principle, a usage arising from inadvertence.  
6 East 387. 9.

Proof of lawful & actual marriages is necessy.  
in y<sup>e</sup> action. If marriage "de facto" gives the  
party no right of action, for there is no legal  
injury.

If y<sup>e</sup> husb. consents to y<sup>e</sup> act, he can't main-  
tain y<sup>e</sup> action, "volenti non fit injuria". 4 L. R. 651. 1 Sels. 136. 15.

So if he himself lives in a state of open  
incontinency. 4 Esp. 16. 1 Sels. 15. Fac. L. Dict. "B. & D." 1.  
& yet it only mitigates damages. 1 Sels. 15.

This is now y<sup>e</sup> settled rule & I think y<sup>e</sup> true one.

(4 Esp. 237. 1 Phil. ex. 139. n.)

1 Sels. 15. n.



It has been holden yt. a husb. cant maintain an action for adultery, committed with his wife, after separation by agreement. 5 T.R. 337.

But this case seems to be doubted. In any case, after a bono is prima facie legitimate, & a vinculum matrimonii is not dissolved. & it is vs. policy to establish any rule that wd. bar their reconciliation. 6 East 244. 1 Selw. 16.

If a wife is allowed by a husb. to live as a prostitute he cant recover.

If a husb. is privy to it, it genlly goes in mitigation of damages. 1 Bul. in. pri. 27. Peak's Rep. 39. 1 Sel. 15.

But husb's mere neglect or inattention as to wife's conduct, goes only in mitigation of damages, for this does not amt. to consent.

4 T.R. 651. 1 Sel. 15.

In aggravation, Plff. may prove her rank, yt. her character was before good, that they lived together harmoniously. so any peculiar twopit side in Def't's conduct. 1 Selw. 300. 13 Etc. 27. Esp. 353.

In mitigation, Def't. may prove plg's unkindness - his having turned her away - having refused to maintain her, her bad character anty act - her previous elopement. - her wanton manners - her having made a first advance - her prior incontinency even before marriage.

1 Phil. ex. 140. 4 Esp. 16. 25. 56. 1 Sel. 30. 1. 3 R. 657. Bul. 27.

But he cant give evd. of her misconduct after act.

According to ancient c. l. a husb. might give a wife moderate ~~excessive~~ correction. 1 Bac. 185. 1 Sid. 113. 6. 1 Hask. 120 1036. 554. 7. This was allowed on a ground of his liability

for her misbehaviour. But according even to y old Law  
as well as y present rule; if he beat her violently  
or even threatened to do it; she d. bind him to y peace  
by writ of *supplicavit* in Chy. or might obtain a divorce  
in y spiritual Ct; 1 Hawk. 120. 1 Sid. 113-16.

2, Mod. 22. Mac 574. Bac 288. *propter sevitiam*. 1036. 1444. 1771.

So violence is allowed now. If y husb. beat y wife  
she may bind him to y peace & "vice versa".

1220. Ch. 445. 1301. 545. 2 Lev. 128. 1 Sid. 113. 3 Kebl. 437.

It seems to be agreed yt. he may restrain her  
of her liberty, for gross misdemeanours - as keeping  
bad company. Stra. 478. Com. Dig. "B & F." c.

The husband's power over y wife was first impaired in y  
reign of Car. 2<sup>d</sup>.

That he may restrain her for keeping bad company  
& destroying his property. see. Stra. 478. Com. Dig. "B & F." c.

But in case of unreasonable confinement. she may  
be released by "*habeas corpus*".

1036. 634. Stra. 478.

He may justify battery in defence of his wife and  
"vice versa".

Le. Rayd. 62. Cro. Jac. 239.

1221. 18. Esp. 314-18.

Each may justify this as in self defence.

If he confine her unreasonably he will be guilty  
of a contempt.

It was held (aliter) by a late Eng. judge, yt.  
y husb. might correct y wife with a stick as large  
as y thumb. Hence he obtained y name of the  
"thumb judge".

Of the mutual inability of the husb. & wife  
to testify for or against each other.

52.

For a genl. rule, yt. y husb. & wife can't testify for



or vs. each other. The reason assigned is yt. the husb. & wife are one person & no one is allowed to testify vs. himself or for himself, more properly. Co. Lit. 600. The union of interest & policy of Law, seem to be the true foundation of the rule. \* 4 D.R. 178. 10 Bl. 145. Their com. interest prevents them from testifying for, & policy of Law, from testifying vs. each other. 1 Qb. Nat. 162. 168. 70. (2 Hask. 31. \*)

1 Phil. ex. 63. 4. Esp. 720. Peck's ex. 173. 5. Bul 285. 10 Bl. 343. n.

The husb. can't testify when the wife is concerned even vs. his own interest, as propy settled to his wife's sole & separate use was taken for the husb's debts. action vs. the thff. & husb. excluded to prove, yt. it was to her sole & sep. use.

Phil. ex. 64. Esp. 720.

4 D.R. 678. 2 N.R. 331.

If an action is brought by or vs. the husb. or by & vs. the husb. & wife jointly, her declarations can't be proved in evd. vs. him. - Hence where "assumpsit" was brought by husb. for wages earned by wife, her acknowledgment of the debt is no evidence.

Phil. ex. 63. 4. 587.

5 D.R. 680. Bul. 28.

So in trespass vs. husb. & wife, a confession of the trespass committed by herself can't be given in evd. 100. 1094. 10 Phil. 64. 2. 7. D.R. 112.

In adultery with the wife, her letters to deft. are not evd. vs. the husb. nor her confessions to the act on him, being made in his presence & neither of them can in any case give evd. tending to criminate the other, as in settlement cases, or others, if the marriage of the husb. is dissolved on the ground of a former subsisting marriage of the husb. & lawful wife, i.e. the first one, is not allowed to testify to the former marriage, tho' the husb. is not a party to the suit. In the case charged with Bigamy.

2 Ld. Ray 373. 1. 110. 161-3. 4 Bl. 163.

4 Esp. 89. 720. Peck's. 173-6. 10 Phil. 65. 2 D.R. 263.

It has been held y<sup>t</sup>. if a husb. has testified as to a fact wh. must have been known (as to his own marriage his wife can't be called by any party to contradict him, as it might subject him to a charge of perjury. (tho' other party may.) 2 D.R. 262. 1 Phil. 67. (J.G. don't think this law.)

A woman divorced "a vin. mat." can't be a witness as to any thing respecting her husb. during coverture. For it might tend to impair confidence of husb. & wife during coverture.

Brak. ev. 174.

6 East 192. 10 Phil. 66.

But she is a competent witness as to facts wh. took place subsegt. to divorce.

This a genl. rule y<sup>t</sup>. a person may testify vs himself & with consent of y<sup>e</sup> opposite party for himself. But y<sup>e</sup> can't do so in case of husb. & wife, even if ptly shd. allow it, Ct. will not permit wife to testify for her husb. for she might testify to facts, unavowed, wh. d. tend to criminate him. \* Br. tit. 66.

And if married woman brings action as f<sup>r</sup> sole the husb. can't testify for deft. to prove her a f<sup>r</sup>me covert, \* Br. ev. 175. Thos. Rayd. 1. 2. "Hardwick cas. 264.) For it wd. defeat her suit, 2 D.R. 265. 2. Brak. ev. 176. 10 Br. 69.

### Exceptions to the first genl. rule.

1<sup>st</sup> On a prosecution for high treason y<sup>e</sup> wife it is sd. may testify vs him i.e. her husb. on the principle y<sup>t</sup>. such a case supercedes every private obligation. Rayd. 1. Gibb. evs. 119. 1 Hale D.C. 48.

Brak. n. pr. 286. 9. 2 Kell. 403.

contra. 1 Hale 301. 2 Hawk. 808. Brak. evs. 177.

10 Phil. 68. 9.

2<sup>d</sup> When f<sup>r</sup>me. covt. exhibits complaint vs her husb. to bind him to y<sup>e</sup> peace as to injury vs her she may testify vs him, &c. converse. 10 Phil. 68. Rayd. 1. Thos. 633.

Brak. evs. 176. 10 Bl. 443. n. Esp. D. 721. 10 Br. 542.

2 Hawk. 452. Brak. 257.



3. When the husb. is prosecuted by a public for abusing a wife personally.

Hutt. 115 1 Mc. Abol. 145. 72.

1 Stra 123. 3 Brel. n. p. 287. 2 Hawk. 308. 2 Esp. 721.

Pear's ex. 172. 13 B. 443. n. 1 H. Abol. 56. Cr. 501. 1 Phil. 68.  
East 100. Cr. 454.

contra. Thos. Ray. 1. Gilb. ex. 120. 19 Mc. Abol. 151.)

The weight of authority is in favour of the rule, & it is reasonable.

The case vs. husb. in case of con. felony or murder, so in an information vs. husb. for attempting to take away a wife by force after articles of separation. 3 Brel. 287. 12 B. 543. 1 Phil. 58.

(The case testifies vs. husb. in case of con. felony or murder so in an information &c. as above.)

4. If a woman forcibly carries away a married man  
a witness of coercion. This act is a felony.

120. Cr. 485. 2 Esp. 721.

10 Phil. 678. 2 Hawk. 608.

3 Brel. 286. 2 B. 174.

It is felony, 3 B. 449. 470. The act is not exco. strictly  
an exco. exception to the rule & a woman may testify for  
him i.e. to show that the marriage was voluntary on her part.

Phil. ex. 68. n. 1 Mc. Abol. 181. n. Here is a strange dilemma. (H.)

1. If a man marries, having a wife living, the second  
wife may testify vs. him though first cannot. This is  
if no legal marriage. 3 Brel. 287. 2 Esp. 721. 2 B. 174. 1 Phil. 68. 10 B. 449.  
as an indictment for bigamy, first being admitted & proved by others  
the 2nd wife may testify to her marriage.

2. In an action between other parties, the wife has been  
admitted to testify as to her husb. &c. & <sup>indirectly</sup> charge him  
civiliter, but not criminaliter, as in an action for  
wedding clothes - vs. a man - his wife; 3 Brel. n. p. 287.

mother was allowed to swear, that they 2 Esp. 720 1 Stra. 304.  
were procured on credit of her husb. In her testimony is not  
evid. vs. her husb.

Secus. When a wife is tried even collaterally to crim-  
inate her husb. Thus in an indictment vs. 3 B. 3 wife if gt.

3. can't testify gt. gt. have husb. committed a offence.

1 Mc. N. 161. 2. 2 D. R. 268. 19 Mc. Abol. 168. 9. 2 Ld. R. 752. 1 B. 443. n.

She can't testify when her evid. op. operate indirectly  
in her husb's favour. ex.-conspiracy - if 3 others are  
all acquitted, one cannot be subjected.

5 Esp. 107. 1 Phil. 68-6. 1 Mc. Kel. 162-3. 172-3.

2 Stra. 1095. 3 Bask. 173.

7<sup>th</sup> Declarations of 3 wife, in regard to transact-  
ions in 3 wife's province, have been admitted to  
prove so as to charge 3 husb. in a civil action.  
as declarations yt. she had agreed to pay a certain sum  
for nursing a child.

1 Stra. 504. 527.

1 Phil. 71. Bul. 287. Esp. 721.

This is somewhat anomalous, where 3 wife acts as agent  
for 3 husb. her representatives are evid. vs. him as  
those of any other agent.

J. G. thinks 3 rule clearly a departure from prin-  
ciple, he wd. also observe, yt. 3 declarations of 3 agent  
are no evid. in. They are made at the time of the  
act done - any made after are not admitted. This  
rule admitting 3 wife, he considers a departure from  
3 principles applicable to 3 genl. class of evid. res-  
pecting agents.

Exp. R. 152. 511. 2 do. 511 in.

1 Phil. 69.

8<sup>th</sup> The dying declarations of 3 wife, are good evid. for  
vs. 3 husb. in an action brot. She is supposed  
to be under obligations equally solemn as those  
of an oath. 1 East R. C. 357. 1 Phil. 68. 2 Leon. 363.

In what cases, Husb. & wife shd. join in  
bringing actions, & in what cases husb.  
may or must sue alone.

In some cases, where 3 cause of action relates to  
the wife or her rights, 3 husb. must join with her  
as D. C. In others he may or may not as he pleases  
& in others he cannot.



It is difficult to reconcile all 3 cases either to principle or to each other, 1 Wils. 423.

First genl. Rule. The wife must join as Plt. showing right of action &c. survive to herself or husband's death.

3 T.R. 631. 1 Bacc. 304.

1 Roll. 347. 1 Wils. 424.

1 East. 507.

Because if y husband might sue alone, he wd. by commencing y action, attach a sole right of recovery, but also because she can't constitute an Atty. Besides as Jdg't. might go vs. her, y marital right might be violated.

By commencing y action, y husband wd. attach a sole right of recovery in himself, & thus (as y case may be)oust y wife of her legal privileges, i.e. her right of survivorship &c.

In actions real for wife's lands, they must join, for y right of action &c. survive to her.

She can't sue alone, not only because of the husband's right to y avails of y recovery but &c. as above.

1 Roll. 347. 1 Bulst. 21.

So in effect, to recover wife's lands (it seems) for her terms survive to her.

1 Bulst. 21. Cro.E. 133.

Exp. Dig. 464.

So in suits on y wife's choses in action, wh. she had before marriage, 1 Roll. 257. 3 Cro.E. 337.

2 Wils. 423. 1 Sels. n.p. 302. 3 T.R. 631. 2 Gdth. 238. 9 Mod. 522.

2 Wils. 670. 8. Com. Rep. 13 & 24. i. contra. And y husband may sue alone or join y wife (but this seems not law)

Cro.E. 133. Exp. 219. 3 Les. 403. 7 T.R. 349. arguendo, contra 1 Term. 396. 10 Rep. jr. 378. Qu. Do authorities contra

regard a suit by husband alone as reducing them to possession or an appropriation of them to his own use? If not they surely ought to be joined. The

principle being admitted, as it undoubtedly is,  
y<sup>t.</sup> y<sup>e</sup> wife's right of action for choses in action will  
survive to her. I think y<sup>e</sup> principle clear, y<sup>t.</sup>  
they must join. This question is now considered  
doubtful in Westminster-Hall.

To recover rent due to the wife while sole, they must  
join in action. Com. B. & F. 33. 1 Roll. 347. 8. Cro. E. 700. Co. L. 35. 6.  
Qu. Since y<sup>e</sup> H. 22 Hen. 8<sup>th</sup> - as y<sup>t.</sup> H. makes it  
y<sup>e</sup> husb's absolutely.

1 Sid. 25. Com. B. & F. 33. 7.

To upon promise made to y<sup>e</sup> wife while sole.

For torts done to y<sup>e</sup> wife while sole she must be  
made a Co. J. 104. 2 Lat. R. 1208. 1 Sid. 187.

Com. B. & F. 33. 7. Cro. J. 501. 538. 628. 1 Sid. 304. 6.

To for injuries to y<sup>e</sup> wife during coit. - ex. slander,  
"assault & battery". (right survives. 1 P. R. 627.)  
(Com. B. & F. 33. 7. 1 Sid. 200. \*)

To for waste committed on y<sup>e</sup> wife's land & for the same.

\*

To in trespass for cutting wife's trees during coit.  
Trees are a part of the inheritance & y<sup>e</sup> right of  
action survives to her. 1 Roll. 347. 8. 2 W. L. 124.

(Com. B. & F. 33. 7. x)

(Cro. E. 90.) Bumbery 277. 2 Kent. 195.

Contra. y<sup>t.</sup> y<sup>e</sup> husb. may join y<sup>e</sup> wife or sue alone.  
Qu. authorities do not support y<sup>e</sup> position.  
The case in Cro. E. was for corn & y<sup>t.</sup> in Venice  
may have been of y<sup>e</sup> same kind.

Action for destroying emblents. on y<sup>e</sup> wife's land  
(as corn, garden vegetables) do not survive to y<sup>e</sup>  
wife; but y<sup>e</sup> husb. (if y<sup>e</sup> do) may sue alone or join y<sup>e</sup> wife.  
Cro. E. 133. 2 Kent. 195. Qu. On what principle can she be  
joined? L. G. thinks they can't join. "Emblents are y<sup>e</sup> fruits



of annual tithes.

Do they may join in Trespass, on restoring wife's  
graff, or injuring it, or her inheritance during  
coverture. Are they not bound to join, as if action  
do. survive to her?

2 Wils. 224 Com. B & F. V.

Bumby 237. Cro. E. 95.

In Trover for y wife's property, if y conversion  
was before coverture, she must be joined. 3 J. R. 631.  
For her right at y time of marriage is in action.  
I take this rule to bear upon y question whether  
a no. y wife must join in action or chooses in ac-  
tion & to decide affirmatively.

677. R. 1.

1 Bac. 289. 3 J. R. 631. \*

Salk. 114. 1 Kent. 261.

So in genl. for injuries done to her person or propy  
while sole.

3 J. R. 637. 1 Mod 157.

Mons 22. 1 Bac. 306.

If y property of y wife is bailed or found before  
coverture & converted after - y husb. & wife (directly)  
may join in Trover - or they may sue alone. 1 Bac. 289.  
Salk. 114. Com. D. 474. 1 Kent. 261. 1 Lev. 107. 1 Sid. 102.  
(Court divided) - by 2 judges - y wife ought to be joined  
What proximity can there be in joining y wife. The  
right at y time of marriage is not a right in ac-  
tion. She is constructively in possession.

1 Bac. 289. 1 Sid. 102. Salk. 114. 1 Kent. 261.

p 77. R. 1. 3 J. R. 631. \*

In Trover by husb. & wife, y conversion shd.  
be led. to husb's damage only.

In the 2<sup>d</sup> class of cases Husb. may sue  
alone, or join the wife at his election.

If y husb. distrain for rent due to y wife while  
sole & a rescue is made, he may sue alone for  
y rescue or join y wife. He may consider the

repere as a tort to himself only - as y goods dis-  
trained were in his power. - or he may treat the pre-  
ceding this out as y means of enforcing her right  
of action.

110. E. 442. Com. "D3 & 2" x.

113 ac. 204. 110 ac. 422. 584.

So in debt or covenant for rent accruing out  
of y wife's land during coverture. Polm. 107. Com. "D3 & 2" x.

The rest is so. to survive to her. 9 dm. 6. 692.

110 ac. 250. - Com. "D3 & 2" x. 4 to 51. Co. L. 102. d. Com. "D3 & 2" x.

The reason probably is, y t. as y claim accrued  
during covert. he is considered as having a right  
to assent to her interest in it, & to dissent &  
treat it as his own. - sed. qm. Is this correct on  
principle? L. G. thinks she ought to be joined.

If a bond is given to husb. & wife during covert.  
he may sue alone or join the wife. 2. Rod. 217.

1. Stra. 230. 4 Y. R. 616. 1. Pl. 209. 113 ac. 205. Exp. 296.

2. Ver. 696. 7 Com. "D3 & 2" x. 1. East 296. 432. Exp. 267.

In this case y above reason appears to  
be properly applied, i. e. y t. he may consider  
it absolutely his, or may assent to her inter-  
est. If he shd. not disagree to her interest, it  
wd. - or his death survive to her. But if she shd.  
not assent to her interest, y whole wd. vest in him  
& no right wd. survive to her.

Suppose y husb. makes no election either way - y  
right wd. survive to her - she takes no right in  
it in any way.

The modern opinions are, y t. when a bond is  
thus given to husb. & wife, tis given prima facie  
to y husb. alone - & if after his death, she claims  
any right as coobligee - y onus probandi lies  
upon her. 1. East 432. 3 Exp. 267.



\* if land is given to m. & wife in her right as executrix. 3 D.R. 516. he may sue alone & join wife & yet go home to surviving wife.

Here we must search for an additional reason. Sh. I take to be yr. - & husb. has a free control of yr. effects - he is liable for execution of his wife's right of executrixship - he is liable for his wife's trust & he may declare us on a bond to himself. 1 Roll. 209. it. acc'ts.

\* he may sue alone & join wife.

So if a bond or obligation be given to yr. wife alone during co't. 1 Lev. 402. 1 Kern. 296. Com. B. 387. 11. 2. 2 Ves. 570. 1 Roll. 20. 32. Here y principle is y husb. has a right to that yr. bond y same as any other pers. chattel given to y wife during co't. as if a carriage be given her it becomes absolutely his by operation of Law. Yet y husb. may give his assent to y wife's interest in, and in that it abso't. on his own. 2 Med. 217.

Now, this bond survive to her, if he shd. not disagree to her interest in it? So Ld. Hardwick expressly says. 2 Ves. 676. It seems not. 1 East. 432. 3 Esp. 266 & yt. it vests originally in y husb. alone, & he assents to her taking an interest in it. L. G. thinks Ld. Hardwick wrong, & y husb. assents to y wife's taking interest.

If a legacy is given to y wife during co't. y rule is y same. Com. B. 387. 4. 3. & C. 19th. 458. 9. 17th. 108.

1 Med. 179. 2 Roll. 21. 125. (Com. B. 387. 8. 3. 8.)

(1 Atk. 558. 9)

That it does survive See. 2 Ves. 676. contra 3 Esp. 266. 1 East. 432. 4. 5 D.R. 692. Robts. 4. 6. 287. 8.

On y question of Survivorship, y case will stand thus. If y husb. has not assented to her taking an interest

est in it, it will go to his representatives. 4 T.R. 617.

If he has assented to her interest, it will survive to her.

As a distributive shall under y H. of distributions.  
2 Com. 22. 564.

If y husb. is obliged to resort to a Ct. of eq. to recover y legacy, y Ct. (as y case may be) will not interpose in his favour, ni upon y condition of his making a settlement or provision for her. Eq's interposition being discretionary. "Ex. & Adminr" 1 qdth. 491. 316. 2 do. 420. Pr. Ch. 348. Proper 97. 233. 6 T.R. 672. 3 Rep. 3. 312. 7 O.P. 12. 2 do. 638.

2 Br. Ch. 663. 3 do. 193. 363.

And now she may maintain a bill in Chy. vs. y husb. & exor. for provision out of y Legacy. As vs. husb. & adm<sup>r</sup> for a provision out of y distribution share, according to her under y H. of distributions, 3 Ves. J. 737. 317. 2 do. 676. 10 do. 378. Toll. 321. 490. 1 H. Bl. 108.

Not so in Court. except in case of a legacy in y hands of a trustee, i.e. she can't have settlement. for action for legacy lies at law. But he may also join the wife as in y last case. 1 H. Bl. 108.

If y wife is y meritorious cause of action & an express promise is made to her, she may join in y action tho' y cause of action don't survive to her - as promise in consideration of her services. Baddip. 75. 249. 4 Mod. 155

4 Mod. 156. Talk. 114. 2 Will. 324. Cro. J. 77. 205. 514.

Com. B & G. 4. Carth. n. 251. 1 Sid. 128. Cro. E. 61.

Or y husb. may sue alone. ib. in Cro. J. it is so. y cause of action survives in this case to y wife. This is a mistake denied in Talk. 114. 1 Bl. - Com. D.

The true reason is, y't. y husb. affirms y promise to the wife by joining her. 2 Bl. R. 1239. J. G. this implied by agreement, y't. wife may take benefit of.



Husb. & wife can't join Assumps. w<sup>th</sup> stating the  
wife's interest 2. B. & M. 12. 136. as in y<sup>e</sup> last cases, viz y<sup>e</sup>  
y<sup>e</sup> service was done & promise was made to her,  
sc<sup>ilicet</sup> not correct. B. & M. n. pr. 53. 2. N. R. 405.

Bro. Jac. 634.

Where y<sup>e</sup> wife is y<sup>e</sup> supposing cause of action & y<sup>e</sup>  
husb. sues for consequential damages, she cannot  
be joined in y<sup>e</sup> action, as in case of slander of the  
wife with special damages laid y<sup>e</sup> husb. For no in-  
terest of y<sup>e</sup> wife is involved in y<sup>e</sup> suit. The declara-  
tion must always be laid with a "per quod servitium"  
amiset.

Salk. 206. Bro. Car. 89. 1 Lev. 140. 1 Kibb. 791.

Bro. Jac. 501. 338.

2 Keb. 387.

in y<sup>e</sup> case of "assault & Battery" of y<sup>e</sup> wife "per quod &c."

The latter has been genlly. called "trespass vi et ar-  
m<sup>is</sup>" Esp. 635. But it is strictly case in principle.

2 N. R. 476. 6 East 387.

1 Selw. 9. 11. 13. 2 Wils. 219. 2 T. R. 167. 5 D. 261. 138

It seems however y<sup>t</sup> y<sup>e</sup> action of trespass is y<sup>e</sup> appro-  
ved remedy. This is in consequence of Precedents at  
variance with principle. "D. & T." 476

If Battery is committed on husb. & wife, they cannot  
join for y<sup>e</sup> whole injury - For y<sup>e</sup> wife's battery they  
can & must - For y<sup>e</sup> husb's, they cannot.

For y<sup>e</sup> batty. is y<sup>e</sup> husb's an injury to him only.

Bro. Car. 90. Bro. J. 555. 501. 338. 2 Selw. 89. Com. 7. B. & T. 476.

But if in this case. separate damages are given,  
for y<sup>e</sup> battery of each, y<sup>e</sup> husb. may release as  
to his batty. & then. it being after judgt. he may  
have judgt. with y<sup>e</sup> wife for her batty.

Hardrup 166. Com. 7. B. & T. 476. 2 Kent 29. 1 Kent. 38. Bro. J. 635.

So if as to husb. y<sup>e</sup> deft. is found not guilty, a  
verdict vs. him gives y<sup>e</sup> battery to y<sup>e</sup> wife is good.

Bro. J. 635. Kent. 29. Hardrup 166.

The husb. must sue alone on promises (in consideration of forbearance) to pay a debt due to  $\gamma$  wife while sole (1 Com. 372. Cro. J. 110) or due to her as executrix Talk. 107. Carth. 462. For  $\gamma$  right created by the promise is his, as  $\gamma$  forbearance is his. For  $\gamma$  right can't legally act in this case. Talk. 117. Carth. 462. Cro. J. 100.

So for adultery with  $\gamma$  wife. For  $\gamma$  injury is to  $\gamma$  husb.

A declaration in trespass by husb. alone, for breaking & entering  $\gamma$  house & beating his wife, tho' with a "per quod &c." is good. Beating  $\gamma$  wife is only aggravation. Stra. 61. Esp. Dig. 407.

On  $\gamma$  other hand, a declaration by husb. & wife for imprisoning  $\gamma$  wife "per quod"  $\gamma$  husb.'s business remained undone to their damage, is holden good after verdict,  $\gamma$  "per quod" being then considered as only aggravation.

Upon demurrer, it shd. be regarded as a mis-joinder of  $\gamma$  wife.

Talk. 119. 6 Mod. 127.

172 ac. 2067.

But regularly, if  $\gamma$  husb. sues alone, when he ought to join the wife, or join her when he ought to sue alone,  $\gamma$  mistake is not cured by verdict. Judgt. may be arrested or error brought. 223 l. Rep. 1226.

Cro. E. 130.

1 Kent. 328. Stra. 31. 229.

Secus - in  $\gamma$  last case only, because  $\gamma$  allegation stating a sole interest in  $\gamma$  husb. is regarded as an aggravation.

But if  $\gamma$  wife sue alone, when she ought to be joined with  $\gamma$  husb. Deft. can plead in abatement only. For  $\gamma$  objection is not to  $\gamma$  action, but to her



disability, & yt. does not appear in y declaration.  
N.D. 627, & Can. 193. L. 1641.

But if her coverture is not so pleaded, & judgt. goes vs. y wife, y husb. may reverse it by writ of Error - "coram vobis" - in the name of both.

1 Bac. 307. 4 Co. 39. For his right might be affected by it.

If y husb. & wife join in an action, & y declaration shows no interest in y wife, tis all on special demurrer, & it seems, on genl. demurrer, 2 N.D. 205. But it is so. by verdict.

1 Sols. N.D. 311. 12. Bull. 53. N.D. 407. n. For as the interest may be joint, y Ct. shew y contrary does not appear, will after verdict, presume so. (contra. Cro. 504. overruled)

In what cases the husb. must be sued with, & in what without the wife.

First - Genl. Rule - The wife & he must be joined with y husb. as sett. when y action do. survive to her, & as the husb. representatives might be injured. This rule is y converse of the genl. rule as to their joining as J.P. 158. 1086. 443. 1106. 1581. Co. L. 351. Cro. Ca. 350. 1 R. 678. 541. 5. Nov. 186. \*

If y wife do. rightfully commence an action vs. y husb. alone, & he shew, the liability of y husb. representatives do. continue & thus the husb. do be subjected contrary to rule of Law. \*

So in actions real, to recover lands holden as husb. - & so in all real actions, she must be made deft. Com. sig. 13. & 14. 14.

So for torts committed before coverture. Co. Lit. 333. 351. 6.  
Com. D. & F. 12.

So for rent due from her while sole.

So for rent due to her est. 12 Hen. 8. rest it solely in husb.  
Co. L. 351. 6. Com. D. & F. 12.

So in genl. all actions, to wh. y wife was liable ante  
covert. she must during covert. be joined with husb. & acts. 1 Jac. 267.

So of torts committed by her alone with h. & husb.  
privately during covert. She is y only guilty person  
& y cause of action wd. survive vs. her. for her  
purchases are only voidable & y. only after  
coverture. Co. L. 301. 1 H. 149. 2 Stra. 1237. 1 Roll 6.  
Com. D. & F. 12.

If a lease is made to husb. & wife during covert.  
she must be joined in an action for rent accruing  
during coverture - because y rent follows y interest -  
it attaches upon y person having y interest, & y inter-  
est will survive to her, for it shal. be recollected, y.  
where a chattel real is given to y husb. & y wife - they  
are joint tenants - & y chattel goes to y survivor. The lease  
is not voidable till coverture ceases. Com. 24. 1 Roll. 348. 1 Jac. 307.  
Secundo. But regularly when y cause of action wd.  
not survive to y wife, she can't be joined, as if  
a femme sole being a lapse married, y husb. must  
be sued alone, for rent incurred during covert.

For it survives vs. y husb. & not vs. y wife. For here she  
can't dispose of y lease aft. marriage, & husb. takes y whole ben-  
efit of it during covert. "feme mariti" d. R. 6. Com. D. & F. 12.

This rule might seem to contradict y rule on the last  
page. But y lease in that case was made to y wife during  
covert. & y. engagement of y wife w. husb. is binding on her,  
tho she may void it after covert. ceased, but in y respect y rule  
is very diff. for here she enters on no cont. during covert.

Assumpsit on y promise of husb. & wife - i.e. y. prom-  
ise is bad, in this case y husb. must be sued -

Com. reg. D. & F. 12. Palm. 313.



If a battery or other Tort is committed by husb. & wife jointly or by her alone, then his coercion, or her alone in his company, they can't be joined in action, but husb. must be sued alone - for in all these cases, the Tort must be considered as his sole act.

1 Roll. 348. Palm. 243. Com. W. Pleader 2. c. 2. Cro. E. 355. 4th. 184. 25.

If declaration alleges yt. a tort was committed by husb. & wife, & declaration is bad - inevitably ill. - even if the husb. is found not guilty -

71. In *Trower vs. husb. & wife*, conversion must be laid in the declaration to y. husb.'s use only. - seems Just. must be arrested on error first, for y. conversion can't in J. d. of Law, be to y. use & y. wife, as she can't by C. L. hold pers. chats. in proper & if there ed. be a conversion to her use, it ed. enure immediately to y. husb. Cro. E. 661. 1 Roll. 6. 12 Jac. 207.

According to these authorities a verdict for y. Pltff. wd. not cure y. Declaration. J. G. thinks yt. a rigorous measure allegation yt. a conversion was made to y. use of y. wife shd. not be thought rendering Decln. inevitable, for this paper wd. (y. Ct. must know) immediately vest in y. husb.

If y. wife is joined with y. husb. when she ought not to be, y. action may be abated. So vice versa. & even if y. mistake is not pleaded in abatement. It is error & motion to arrest is good - as action vs. husb. & wife charged to have been broken by husb. only, or vs. y. husb. alone for a debt of y. wife while sole. 12 Geo. 106. Com. W. Cro. E. 202.

1 Sel. 310. 7th. R. 348.

2 Wils. 227. 1 Vent. 93. 1 Sel. 315.

In a gen. covt. being sued alone pleads covt. & arrears, she may have execution for costs, in her own sole name. for she is (y. Def. or record) or by Sci. fac. her husb. & she may have execution together

Long. 614.

The wife when sued with y<sup>e</sup> husb. can't plead alone, 72.  
nor can she appoint an atty. for y<sup>e</sup> law suit al-  
low a fem. cont. to appoint an atty. The husb. must  
join. 1 Esp. 318. Cro. J. 229.

The reason she can't appoint an atty. is  
y<sup>e</sup> same, y<sup>t</sup>. disables her from making any other  
contract.

Suppose her sued alone. Then it is otherwise  
it seems) for y<sup>e</sup> atty. having sued her as sole, can't  
deny her right to plead as sole.

## Of the celebration of Marriage.

Marriage is a civil contract at C. L. tho' seems  
in Catholic countries. Falk. Mo. 437. 1 Bl. 433.

As to y<sup>e</sup> mode of solemnizing marriage.  
By our St. - Publication is necessary either in some  
meeting on Sunday, where y<sup>e</sup> Parties, or either of  
them reside, or by a written notification, posted  
up about y<sup>e</sup> church. During 8 days.  
1 Bl. 439. 40. St. Con. 477. 8.

In cases of Minors - Publication & consent of parents  
or guardian is necessary in y<sup>e</sup> old St. publication.  
or consent. St. Count. 478. 1 Lev. 189.

If clergymen &c. celebrate marriage contrary to y<sup>e</sup>  
provisions of y<sup>e</sup> St. y<sup>e</sup> marriage is good. & y<sup>e</sup> ven-  
ally is incurred by y<sup>e</sup> magistrate or clergyman.

Is a marriage solemnized by a private person  
or by y<sup>e</sup> parties themselves? It is only deemed  
not so. If good why does y<sup>e</sup> St. authorize p<sup>r</sup>so-  
ns to solemnize it. 1 Bl. 439. n. 3. 435.



Before 7 H. 26<sup>th</sup> Geo. 2<sup>d</sup>. If persons, not authorized, solemnized marriage, Bonaud Regard. prohibit 7 Ecclesiastical Ct. from treating 7 marriage as void. Yet y<sup>t</sup>. Ct. will not grant administration of wife's estate to 7 husband. Lask. 120.

That H. provides, y<sup>t</sup>. marriage contrary to its provisions is absolutely void.

*All marriages A.J. thinks are now regulated by H. 4 Geo. 4<sup>th</sup>.*

## Of void & Voidable Marriages.

Impediments to marriage in Eng. are of two kinds. I. Canonical II. Civil.

I. Canonical impediments - viz. consanguinity - affinity & In-becility. are derived from 7 divine Law. 7 three last mentioned impediments are cognizable in Eng. by 7 spiritual Ct. 1036. 434. 5.

Previous contract seems to be abolished. See H. 32<sup>Hen</sup>. 8<sup>th</sup>. 2<sup>d</sup>. & 3<sup>d</sup>. Edw. 6<sup>th</sup> & 26<sup>th</sup> Geo. 3<sup>d</sup>. & 4<sup>th</sup> Geo. 4<sup>th</sup>.

The three first being derived from 7 divine law, are hence incorporated in 7 Ecclesiastical Law 7 Roman Empire. They have been sanctioned by 32 Hen. 8 - & become a part of 7 written Law. It is declared in y<sup>t</sup>. H. y<sup>t</sup>. nothing (God's Law except<sup>d</sup>) shall prohibit marriage within 7 Levitical degrees.

*See abn. "B. & F." 34.*

The Levitical degrees are 7 standard as to consanguinity & affinity, within wh. marriages are lawful or no.

"Nothing (God's Law except<sup>d</sup>) shall prohibit marriage within 7 Levitical degrees." This exception probably includes in-becility, it being an impediment in the divine Law.

Canonical impediments render 7 marriage only voidable, & y<sup>t</sup>. only during 7 lives of both parties, 7 separation being "pro salute animarum".

For y real object of y proceeding was spiritual discipline, & y spiritual proceeding being a divorce, it must be late if at all while both parties are alive. Co. Lit. 33. 1036. 534. 41. Joffine B. R. (or Bancus Regis King's bench) will prohibit y ecclesiastical Cts. to declare y marriage void.

Salk. 548. 1036. 434.

Rule. All persons linearly related by consanguinity or affinity, in y fourth or any higher degree, by y civil law computation, are allowed to intermarry - as first cousins - (This is not allowed in Roman Catholic countries. 3 Benc. 571. 1036. 435. n.)

Among collaterals, y most distant prohibited degree, is yt. of uncle & niece, & aunt & nephew. It makes no diff. whether y 3<sup>d</sup> degree is by affinity or consanguinity.

1036. 435. n. 200. 207.

All within y 4<sup>th</sup> degree are prohibited, - causing german man marry.

In Count. by a late St. a man may marry a deceased brother's widow. H. Count. 478. 1. 186. 7.

Marrying y sister of one's deceased wife, has always been allowed here, tho by some deemed to be illegal.

The degree of affinity is y second.

(Co. L. 28. n. Lit. 205. Hobb 181.)

But tho a marriage is within y prohibited degrees, yet if no divorce takes place during y lives of y parties, y issue is in Eng. law legitimate. The divorce is in such case "a vinculo matrimonii."

"Barrett & Child" 74. Salk. 548. Salk. 121. 1036. 440. Co. L. 276.

In Count. y marriage is declared "null & void" & y issue illegitimate - & y question of legitimacy may arise after y death of both parties. H. Ct. 479. 3. 5.

The parties are also subjected to severe punishment, for incept - one of y most highly penal offences known to our Law. (except capital.)

In Eng. incept is punishable only in y spiritual Cts. 7

Salk. 548.

436. 67. 5 190. 435.



## II. Civil Impediments.

First. Prior existing marriage.

Second. Want of age. 1st. is 14 or 12.

Third. Want of consent of Guardians or Parents.

Fourth. Want of reason. 1 Bl. 436. "Par. & Child."

These it is so. render y marriage void "ab initio" so yt. there is no need of divorce to set it aside. This rule is now altered, where y impediment is want of consent of y parents, by Stat. 4 Geo. 3<sup>d</sup>.

Want of age does not appear to make it void to all intents.

First. Prior marriage. Hence y 2<sup>d</sup> marriage is not only void but amts. to Bigamy, wh. in Eng. is felony by St. 1 James 1. 1 Bl. 436. 470. 16<sup>th</sup>.

Second. Want of age. In this case y marriage may be ratified on y parties attaining y age if consent with. another marriage. To 4<sup>th</sup> intent y marriage seems only voidable. But they may also disagree & rescind it with. Divorce. In respect it seems void.

The age of consent in females is 12. in males 14. 1 Bl. 436. Co. Lit. 79. 1 Bl. 436.

If one of y parties is under y age of legal consent at y time of marriage, until yt. party has attained the necessary age, & yt. party has ratified it expressly or impliedly either party may disagree. The principle is, yt. y contract to be binding must be mutual.

ib. sects.

Now upon a contract to marry in future, if one of y parties is of y age of 21 & 3 other not, y former may be made liable on failure of performance, but y other can't be. This rule is y same, as all executory contracts between Adults & Minors. 1 Bl. 436. n.

Third, Want of consent of parents & Guardians, is no impediment at C. L. but is made so by St.

Where consent of mother or guardian is required. see 10 Bl. 437. 8. n. This is now abrogated by a new St. of 4<sup>th</sup> Geo. 4<sup>th</sup>. 10 Bl. 437. 8. n.

Fourth. Want of reason, The marriage of an idiot is void & he must forever remain incapable of marriage. So of a lunatic - tho I conclude he might ratify a marriage at a lucid interval, but I've never known a case of yr. kind.

12 Cl. 157. 10 Bl. 413.

Our Cont. law on yr. subject is very diff. from Eng. in several respects. 1<sup>st</sup>. first - A marriage within prohibited degrees is here absolutely void. Hence no divorce is necessary to vacate it, & hence also yr issue before divorce is illegitimate.

Second. want of consent of marriage parents, does render yr marriage void here, but subjects the minister to a penalty. In Eng. it makes yr contract void, unless there is a publication of Banns.

10 Bl. 437. 8.

Third. The impediments of previous contract were never known to our law.

Is a marriage celebrated in another state between parties belonging to yr. state, & who leave it for yr purpose of evading our laws (Conn) good here?

The rule of our law not being complied with, tho yr marriage is agreeable to yr Law of yr other state? 2 H. Bl. 142. 412.

2 Bac. 114. Co. Lit. 79. B. 80. n. 6. 2 Burr. 1080.

This point is now settled by yr unanimous consent of yr profession & public in yr affirmative. Tho I do not think there has been any decision determining yr precise point. The frequent exceptions to *Quarta Green*, seem to direct yr subject of all doubt.



## Divorce.

Divorces are of two kinds. 1<sup>st</sup> a "vinculo matrimonii"  
2<sup>d</sup> a "mensae et thoro."

The first is a total, the second a partial divorce. The first is a complete dissolution of the contract. The second does not abolish the relation of husband & wife - but merely separates them. 1836. 440.

In Eng. those of the first kind can be obtained only for some of the canonical impediments before mentioned - & these existing before marriage (as is always the case in consanguinity) - a separation as in the case of impotency - 1836. 435, 6. 40. These causes of divorce are cognizable in Eng. only in the Spiritual Cts.

But there may be a supervenient impediment of the description, & in that case, there can be no divorce, as divorces can't be obtained, unless the marriage is illegal. Here I mean total divorces. & I refer to the general laws of Eng. & such divorces as are grantable by the Cts. of justice. For a divorce "a vinculo &c." is sometimes granted by Parliament, & such private & special acts of Parlt<sup>e</sup> may be founded on other causes than the canonical causes or impediments. (ib. sup.)

When a total divorce is granted, the issue of the marriage is illegitimate. For the divorce nullifies the marriage "ab initio" 1836. 434. 40. tho' originally it was voidable. 1 Bac. Bastardy a.

Co. Lit. 235. 1 Roll. 388. 60.

The causes of partial divorce in Eng. are adultery, cruelty, and well grounded fear on one side of great bodily injury on the other. These are granted in ecclesiastical Cts.

More 685. But Parlt<sup>e</sup> of late, often grants total divorce for Adultery.

Divorces in other cases, are in Ecclesiastical Cts.

No. 4.

1831. 441.

Husb. &

Wife

Par. & Child

In case of partial divorce, & wife is generally entitled to alimony, to be settled in Eng. at & discretion of & Ecclesiastical Judges, & for wh. if payment is not made, an action lies at C. Law. 1831. 441. Lev. 6. to enforce it, for & eccles. Ct. can't enforce its decrees, for its power does not extend to personal property. Its power extends only to excommunication. But in case of adulterous cohabitation & living in adultery, alimony like power is not allowed.

1831. 441. 2.

After a partial divorce, issue born, is presumed to be illegitimate. For & more of & separation is presumed to have been obeyed. But pt. presumption may be rebutted & if so rebutted, they have all & rights of any issue. "Par. & Child" 73. 4. 1831. 457.

7 C. 32. & 2 R. 280. 1831. 480. 4. 5.

In case of voluntary separation, subsequent issue is presumed to be legitimate. For as the parties are not required by law to live separate, no presumption, such as pt. in & former case, can arise.

By H. of Court. Divorces are ordinarily granted by & Supreme Ct. The causes are - (Stat. 925. Chap. 48. 5.

First. Fraudulent contract.

Second. Adultery.

Third. Three years wilful absence or desertion, with total neglect, i. e. means, I suppose, his neglecting to administer to her bodily wants - & driving her away by violent abuse, is equivalent to desertion -

Fourth. Seven yrs. absence unheard of. The Sup. Ct. may declare & party at home single.

Fifth. Three yrs. absence on a voyage, usually





as for extreme cruelty. intolerable abuse. 1 Swift. 193.

Total divorces in Court do not affect y legitimacy of y issue previously born. 1 Selw. 192. Since they are granted only from supervenient causes, unless in the case of a fraudulent contract, & yt. either supposes y impossibility of issue or warrants y divorce merely by way of relief to one party vs. y fraud of another.

It don't make y marriage meretricious. In Eng. where there is a total divorce granted, y woman has no Dower or Alimony granted; For as such divorce is never granted except for such impediments as existed before marriage, it renders y contract void "ab initio". 2 Bl. 130. 3. 7. 7 Co. 70. 3 do. 98.

A partial Divorce don't deprive her of y rights of Dower. except in y case of an adulterous elopement. by St. Mgr. 2<sup>d</sup> Co. Lit. 32. 3. 9 Co. 19. Co. 6. 403.

Indeed tis her elopement & not her divorce yt. bars her right in y<sup>e</sup> case. Co. Lit. 32. 3. 2 Bl. 136. 3 do. 276.

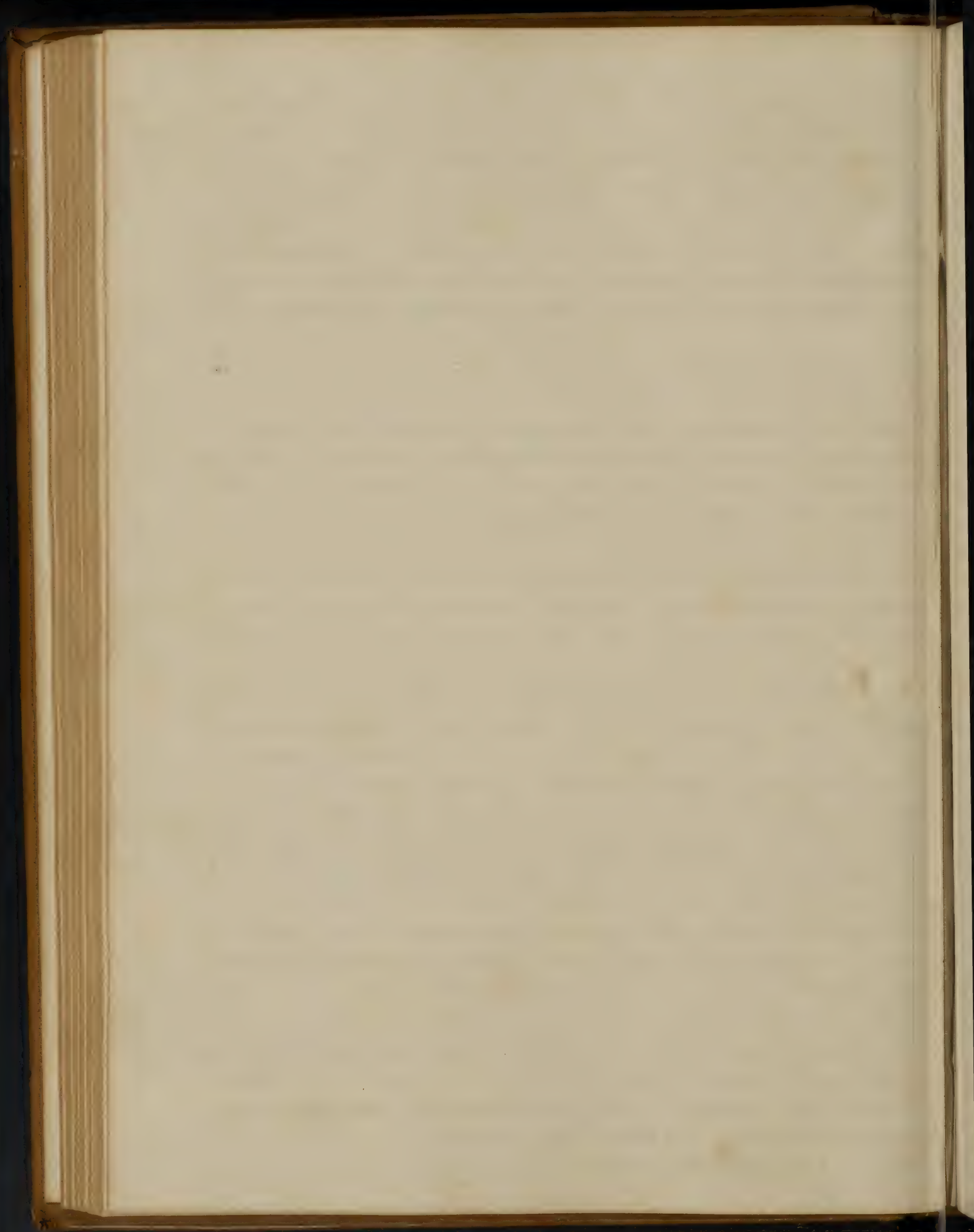
In y case of total divorce in Court y wife has Dower, if she has not y faulty party - also part of her husband's estate, not exceeding 1/3 may be assigned her immediately for Alimony.

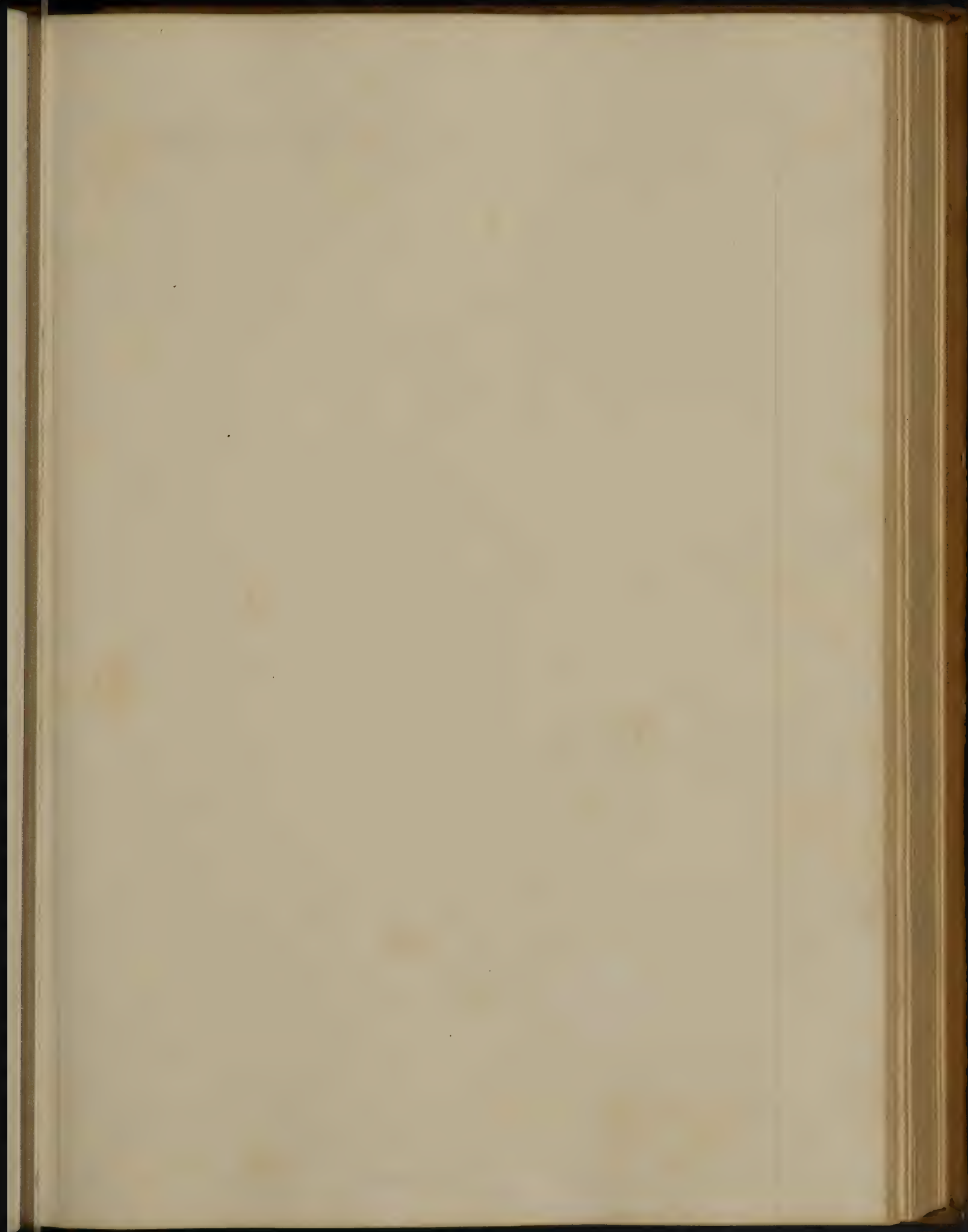
Personal property may be granted her as Alimony - as adjudged by Sup. Ct. & affirmed by Ct. of Error.

So where marriage is within y Levitical degrees, y Sup. Ct. may assign to y wife a reasonable share of husband's estate; not exceeding 1/3 tho' the marriage is "ab initio" void. This I think peculiar to our Law. St. Court. 479.

Finis Husband & Wife.

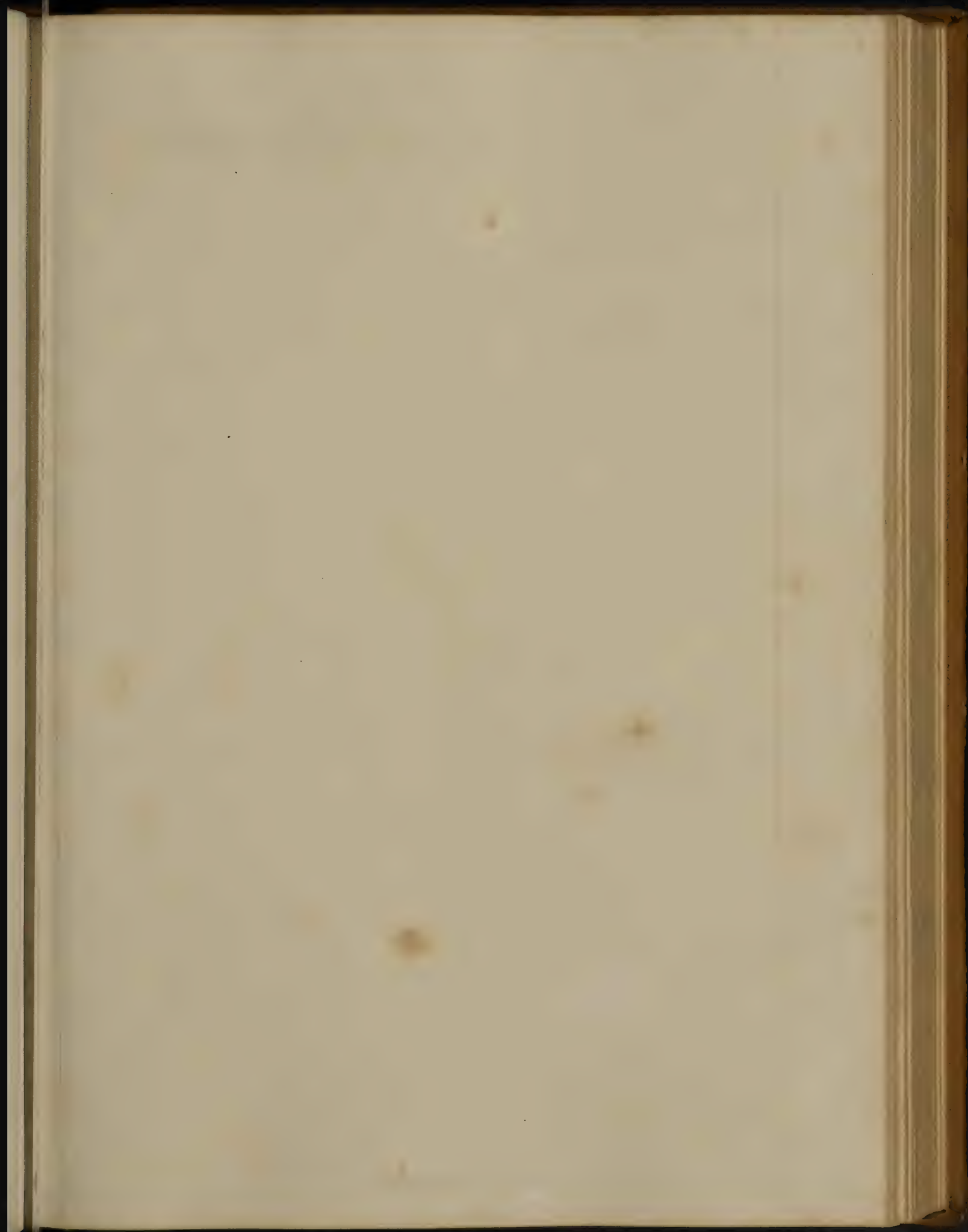




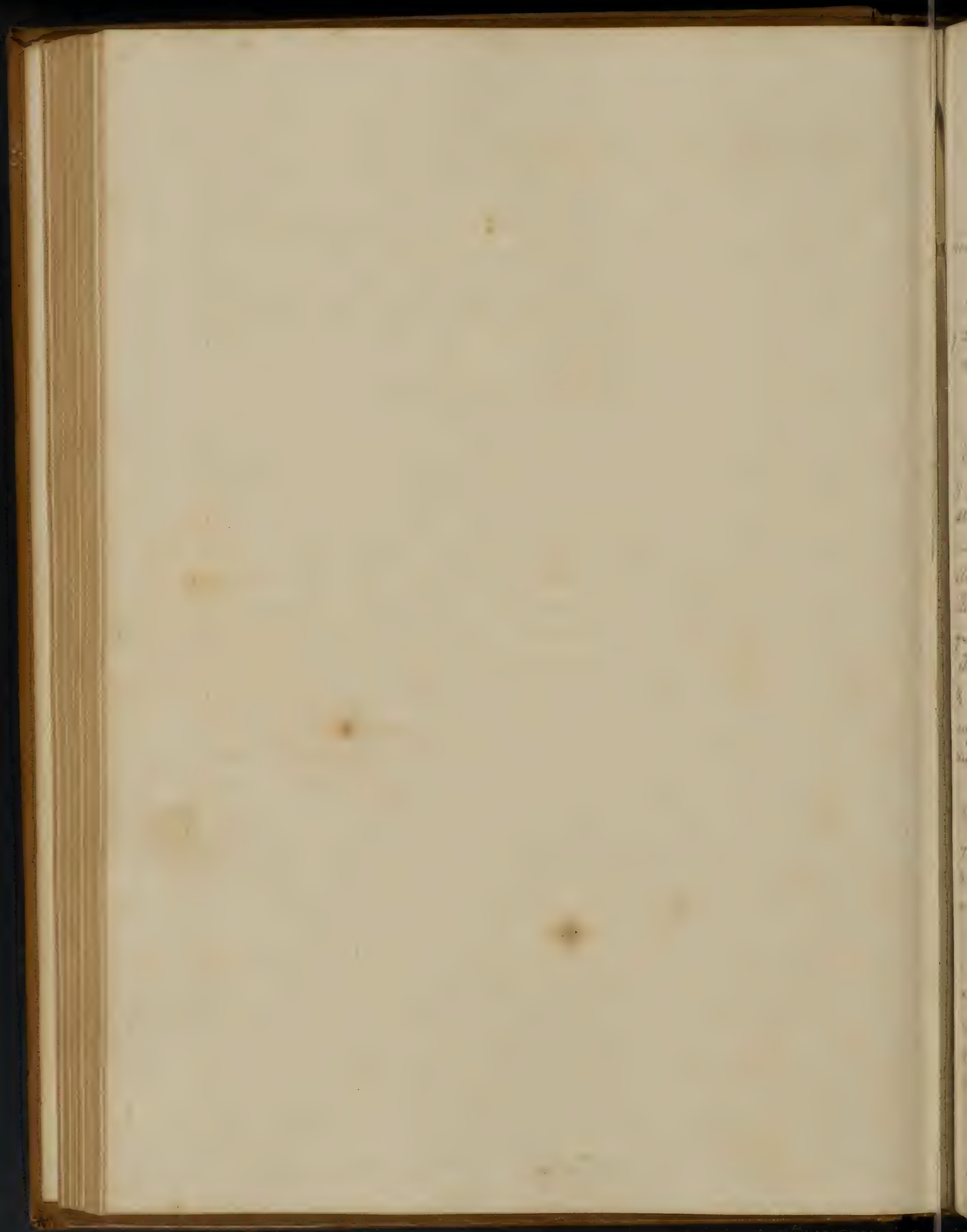












## Parent & Child.

An infant or minor is any person under 7 years of age if male or female. Stat. sec. 104, 259. 1 Bl. 403.

By 7 C. L. full age is completed, on 7 day preceding 7 21<sup>st</sup> anniversary of one's birth, & on 7 first moment of 7 day.  
Salk. 44.625. See. 112. 480. 1096. Post. 1. 144. 656.

### Privileges & Disabilities of Infants.

First - as to Crimes. No person under 7 age of 7 yrs. is punishable for any crime whatever. 4 Bl. 223.

At 7 age of 14 a person may be punished capitally. 4 Bl. 22. 190. 464.

There are some cases in wh. infants above 14 are privileged, with regard to misdemeanors & offences not capital. These, however are offences only of omission, & in genl. infants are not liable for offences of omission.

For an infant is presumed to want prudence & foresight & besides, he has not 7 means of performing what he ought to do, as he has neither time or property at his disposal. 1 Hawk. 1 Co. Lit. 247. 8. 1 Hale 20. 6. 534. Foster 6. 170. 2.

1 Bl. 464. 4 Co. 223.

But where an infant is prosecuted, it is a rule, y<sup>t</sup>. he is not to be convicted on confession without great caution, & great perseverance on his part in 7 confession. Particularly in higher offences. 1 Bl. 464. Cro. J. 468. Foster 77.

1 Hale 20. 6. 223. Plowd. 19. Foster 439. Coop. 223.

A genl. St. inflicting corporal punishment, sometimes extends to Infants, & sometimes not, unless Infants are expressly named. The distinction is, if a St. creates such an offence, as is punishable at C. L. by corporal infliction, Infants tho' not named are punishable.

If a St. prohibits an offence, or an act under penalty of cor.



verbal punishment. but without constituting it such an offence as is corporally punished at C. L. Infants in name are not punishable. This is sometimes called collateral punishment. But when offence was punishable at C. L. but not corporally, Infants are liable to C. L. punishment. Co. Lit. 247. 337. Plowd. 364. Cro. J. 274. 1 Hawk. 1.

4. Second. Torts. For Torts committed with force, Infants, for torts committed with force are acutely at any age liable civiliter, tho' not criminaliter.

For Torts committed with force, upon a mere question of guilt or not guilty, & concurrence of will has nothing to do with the case. 12 Mod. 81. 1 Hawk. 3.

2 Roll 547.

9th. What age is an Infant liable in Slander?  
It has been determined at 17. he is liable. J. G. thinks 17. he is "soli capax". Slander requires concurrence of will; it necessarily includes malice. When "soli capax" he is capable of committing what in law constitutes Slander. Ray. 129. 3 Bac. 132.

5. An Infant is liable to be punished as a common cheat, not under 14. For under 14. a question of "soli capax" does not arise, as in cases of felony.

1 Sid. 129. 258. 1 Lev. 169. 1 Keb. 778. 905. 13. 1 Fent. 71. 3 Bac. 132.

It is so. an infant is not liable to a civil action for frauds. But a Rule needs qualification. In 1 Keb. 914. it is so. he is liable only for Torts, with some kind of force; but a case of Slander is directly vs. this question decision, & Lds. Mansfield & Kenyon are opposed to the doctrine in Keble. 3 Brev. 1802.

2 Bk. Rep. 223.

Judge Gould thinks a true rule to be this. viz. an Infant is liable to an action for frauds or deceit, civiliter, if "soli capax" in subjecting him to a fraud & virtually subject him to a contract, not binding

upon him. This rule is inferable from the following case. J. leased a horse to D. an infant. & brought an action vs. D. for overriding him. as for a tort it was held y<sup>t</sup>. y<sup>e</sup> action wd. not lie; for y<sup>e</sup> violence was merely a breach of y<sup>e</sup> contract of J. Bailment. 1 Keb. 905. 13. 87. 335. 1 Lev. 169. 1 Sid. 129 contra 6 branch 225. 1 Esp. Rep. 172. But where y<sup>e</sup> objection does not exist, he must be after y<sup>e</sup> age of 14.

As to fraud, it was once held y<sup>t</sup>. if a person wd. 6 represent himself to be of age, when he was not, y<sup>t</sup>. he wd. not give Evid. of his Infancy. *see* *see*.

There are cases in wh. Chs. will decree performance of a contract vs. an infant to prevent fraud - The cases coming within y<sup>e</sup> rule, y<sup>e</sup> Chancery acts as guardian to y<sup>e</sup> infant, & will impair y<sup>e</sup> interest of y<sup>e</sup> infant. But y<sup>e</sup> cannot be done even in Eq. where y<sup>e</sup> contract is absolutely void - for y<sup>e</sup> wd. be making a new contract for y<sup>e</sup> benefit.

1 Lamb. 101. 2. 120. 38. 1 Eq. cas. 489.

130. ch. 353. 358.

Contracts. An infant can bind himself by a contract (genly.) & then contracts are either in part void or voidable -

1 Hen. 20. 75. (p. 10)

131. 465.

If an infant & adult join in a contract, latter is bound, in y<sup>e</sup> undertaking of y<sup>e</sup> infant is absolutely void, in wh. case tis no consideration or y<sup>e</sup> part of y<sup>e</sup> adult & neither are bound. Long. 500. 8. 102. 190.

And y<sup>e</sup> adult liable in an action vs. both? tho' the infant prevails in it, there being no variance in y<sup>e</sup> case - Suppose they join in a single bill or note, (wh. is only voidable) & y<sup>e</sup> infant prevails in his plea of Infancy, y<sup>e</sup> authorities are, y<sup>t</sup>. y<sup>e</sup> P<sup>l</sup>tf. can't have Judgt. vs. y<sup>e</sup> adult, but must continue & begin "de novo" vs. y<sup>e</sup> adult. 3 Esp. 75. 3 do. 47. 1 Ch. 20. 32.



But Qu. is y<sup>e</sup> rule agreeable to principle? For there is no variance. There is a joint cont<sup>l</sup> in fact as laid - & y<sup>e</sup> p<sup>ty</sup> must have joined y<sup>e</sup> Infants. I think the Ld. Kenyon says otherwise.

In 5 Johns. 100 y<sup>e</sup> rule Ld. Kenning above authority is denied & I think properly.

If an Infant contract with an adult, y<sup>e</sup> latter is bound tho<sup>y</sup> y<sup>e</sup> former is not. The privilege is y<sup>e</sup> infant's, & thus personal, 1 Bro. C. 38. 19 Mod. 25. 3 Mod. 248. 2 Stra. 937. 1 Vent. 31. Bro. C. 302.

The rule is y<sup>e</sup> same in Law & Equity. A specific performance can be decreed vs. an Adult, provided y<sup>e</sup> Infant performs his part & not with<sup>in</sup>. 1 Bro. C. 39. 40.

But this rule does not hold, if y<sup>e</sup> contract goods y<sup>e</sup> infant is absolutely void, for there is no consideration moving y<sup>e</sup> Adult - Here y<sup>e</sup> Adult is not bound, for y<sup>e</sup> infant's power of Attorney is void. 2 Stra. 938. 1 Bro. C. 39.

And if y<sup>e</sup> infant has received y<sup>e</sup> consideration & afterwards avoids y<sup>e</sup> contract, he is not bound to refund or restore it. It is considered as a gift to him.

1 Sid. 129. 1 Lev. 109. 1 Keb. 905. 913.

Qu. y<sup>e</sup> cont<sup>l</sup> being disaffirmed, wd. not trover lie against y<sup>e</sup> demand or indebitatus Assumpsit "implied", "ex delicto" as y<sup>e</sup> case may be - as if y<sup>e</sup> specific property remain in his hands?

Might not Eq. interfere, under consideration to prevent fraud? as y<sup>t</sup>. Ct. wd. restore y<sup>e</sup> prop<sup>y</sup>. specifically, with<sup>in</sup> impeaching or impairing his own proper estate. This a Ct. of Law can't do, & ergo I conceive he can't be liable at Law.

But for necessities, an Infant under some circumstances, may bind himself by cont<sup>l</sup>. May any these

five. Food, Apparel, Lodging, Medicine, & Instruction.  
- As for being instructed in a valuable trade. 1 Dougl. 345.

136. 166. Co. Lit. 172. Cro. J. 495.

8 T.R. 578. 1 Sid. 112.

But y thing contracted about must be necessary for y  
infant, at y time of contracting. Cro. E. 583. Cro. J. 460.

9 Poph. 151.

The question an they are necessary is to be left to the  
jury. As to y distinction between matter of fact & mat-  
ter of Law, it is y. - What description of articles is nec-  
essary is a question of Law, - but what articles of any  
of these descriptions are necessary is a question of fact for  
y jury.

Ergo, when y Deft. pleads infancy, y replication of nec-  
essaries is good - generally. Stra. 1101. 8 T.R. 578. Exp. 8. 162.  
Carth. 110. 11. Cro. J. 560. For y matter replied, is matter  
of fact not of Law. What description of articles are  
necessary is a question of Law, but what articles of  
of any of these descriptions are necessary for an in-  
fant in any given case, is a question of fact.

Cro. E. 583.

An infant may bind himself for his wife's neces-  
saries, as well, as his own; For if he is able to bind  
himself in marriage, he must be able to bind him-  
self to y incidents of yt. (marriage) contract.

So may an infant bind himself for his children's  
necessaries, for being bound by y principle contract  
i.e. marriage, he must incur y obligations incident  
to it.

So he is bound for all debts contracted before  
coverture.

But an infant cannot bind himself even for nec-  
essaries, if under y care of a parent, or Guardian,  
or Master, & duly provided for. He is only allowed  
to contract, yt. he may not suffer.



Hence an Infant can bind himself even for necessaries only in these three cases.

First. If he has no parent or Guardian.

Second. If out of y reach of their care.

Third. If being under their care, he is not duly provided for.

But in y two last cases, y Infant's Parent, if he has one it seems, is also liable; For Parents are bound to maintain their children & y infant's power of contracting in these cases, is more intended not to discharge y Parent, but to relieve himself.

1236. 466.

In strictness however, y Infant is not bound at C. L. even for necessaries, by his express contract; For he is not so course liable to y extent of his contracts or agreements, But only to y amount of y true value of y necessaries. This obligation seems then to be founded on a contract implied.

Co. L. 83. Latch, 69 Co. L. 500

Poph. 150. 1. Roll. 729

As to y mode by wh. an Infant may bind himself for Necessaries by writing.

First. By penal Bond, he cannot. - "A single bond is an acknowledgment made under seal of a debt."

206. 2. 167.

Roll. 729.

1200. cont. 54.

Co. L. 20.

Second. By a single bond he may.

22. 1. 38. 1200. 938. 1200. 80.

Chit. 234. 20. 1200. 382. 1200.

Third. By a negotiable note, when actually negotiable, he is not bound.

1200. 41. 1200. 73.

Fourth. By a note ~~not~~ not negotiable - or it seems by a negotiable note not negotiated, he may be bound.

Chit. 234. 20.

1200. 413. n.

Co. L. 150. 1200. 73. 1200. 345.

Fifth. By a bill of exchange not negotiated, it seems, he may be bound, but not if it be negotiated.

Chit. 20. 8.

Co. L. 160. 1200. 73.

Sixth. By account stated, he is not bound.

1200. 87.

Co. L. 172. Latch 169. 1200. 40.





Qu. In y case of a penal bond for necessities, is y Infant liable on y original contract? It depends upon y question, - Does y bond merge y simple contract? It seems not merged if y bond is void. For y action of Moyer is founded on y bond, yt. y lower obligation or remedy is swallowed up by y higher. But a void bond creates no obligation or remedy. So in Gray vs. Toller, 1 H. Bl. 462, held yt a contract originally good is not affected by an usurious stipulation, analogous to Robertson vs. Bland, 2 Stra 1249.

But, n. p. 115. Poph. 165. 1 P. C. 218. 3 Bur. 1078.

Qu. When is y bond void? see ps. 23. 29. post.

14. But a single bill does not merge y original contract. It binds y infant for necessities, & if not this only voidable.  
Gm 2. 164. 2 Stra. 1249. 3 Bur. 1078. But, n. p. 115. 1 P. C. 218.

In court, a note by an infant tho. not for necessities is only voidable. In 1809, decided by y Ct of errors to be void.

For money lent an infant is never liable any way, either at law or in Eq. n. it is actually laid out in purchasing necessities. It has no real bounds, n. y lender himself lays it out, & even tho. y infant shd. recd. it, y contract is good or not n. y time of lending. 1 P. C. 37.

1 Sa. K. 277. 386. 10 All. 67. 5 D. 368. 10 P. C. 37.

But if y Lender lays it out, he recovers y value of necessities, only tho. y amt. lent shd. be greater, so yt. he recovers as vendor of necessities & not Lender for strictness then, y Infant seems liable at Law, not as for money lent at all, but as for necessities, purchased with it. (ib.)

The infant is bound if y money is laid out in necessities, even by y Infant himself; y Lender is then in place of Vendor as considered in Eq. & recovers y value of necessities. 10 P. 383. 58. 2 Eq. cas. 516.  
1 P. C. 37. "P. C. Chy."

But at Law, he can be considered only as a lender in  
ys case, & if converse can't recover at Law.

An Infant is not bound by contr. & articles to main-  
tain his trade, they not being deemed necessities.

Str. 1085. Co. J. 494. 1 Bos. C. 36. 1 Talk. 279.

1 Roll. 729.

If an infant is an owner of a building, he is not  
bound to keep it in repair but his guardian.

3 Talk. 196. 1 Bos. C. 36.

But if he takes a lease of a house he is liable in  
debt for y<sup>e</sup> rent.

2 Burr. 69 Co. J. 320.

As of Land. But y<sup>e</sup> is not as obvious to L. Y.

1 Bos. C. 35.

The extent to wh. an infant may go in contracting  
for education is according to his rank & situation.

It has been determined y<sup>t</sup>. a contr. for instruc-  
tion in music & dancing is not binding.

(Infants of rank might be bound.) J. G. doubts whether y<sup>e</sup> rule  
shd. be as strict at y<sup>e</sup> present day.

He is bound at Law for necessities only.

But if an infant does voluntarily what he is compelled  
to do either in Law or in equity - he is bound by y<sup>e</sup> act.  
As if infant makes equal partition with co. tenant -  
pays rent on a lease revolving upon him - 2 Burr. 688.

3 Co. 1801. 2. Co. Lit. 172. 315. a. So if he incurs  
an estate subject to a widow's dower, & he appoints or  
apportion it y<sup>e</sup> act is valid, in at full age,  
we can show, in these cases, y<sup>t</sup>. he acted to his  
advantage. 1 Bl. R. 375. 9 Co. 85. 1 North. 77. 3 Burr. 1794.  
4 Cruise. d. 15.

So if an infant mortgages recovery on payt. of debt.

In contr. his guardian may be bound to make recon-



vengeance, by St. & now y Guardian or Mortgagee's Executor  
or Adm<sup>r</sup> may on recovering y Debt, release with  
a decree in Eq.

This (when he does that he is compelled to do) is y  
only class, in wh. an Infant is bound at Law  
for necessities.

An Infant Deft. is bound by decree in Eq. ni. yt.  
he is allowed 6 months, after full age, to impeach  
it for fraud or error. 2 Vern. 342. 429. 2 Vent. 351.

1 Vern. 295. 9 Mod. 128. 2 P. Wms. 401.

3 P. Wms. 352. 1 Fontb. 756.

An Infant Plt. is as much bound in Eq. as an  
adult, & has no day after full age, to set  
aside y decree, ni fraud or gross neglect, appears  
in his "prochein ami" or guardian by whom y suit  
must be brot.

Any person may bring in Eq. a bill, or a suit at  
Law, but he must be admitted by y Ct. as com-  
petent, or y suit will fail; there is ergo little  
danger of fraud or neglect, & if y guardian or next  
friend is guilty of fraud or neglect, he is liable to  
y infant, & if y suit fail, he, not y infant, is  
liable for y costs, & whether they come out of y infant's  
estate at y final settlement. Depends upon his con-  
duct in y suit. 3 Atk. 626. 1 Fontb. 75.

Such acts of an Infant as do not affect his own  
interest, but take effect from authority wh. he has  
a right to exercise, are binding - as an Infant  
executor only pays & receives debts & discharges them -  
or executes an office he may hold. 3 O.S. 1802.

Com. D. Adm. E. Toller. 3567. Off. & Exec. 215. 17-18.

There is in Eng. a very recent St. wh. forbids him  
to act until 21 - Such I take to be our Law.

It promise after full age will bind & promise to a cont.  
made before, tho- it was not so necessary.

But not when & original contract was void. But  
only when & contract ~~was~~ originally was voidable:

Exp. 162. 1 Doct. 131-2. 1 J.R. 648. 2 Vent. 203. 2 J.R. 766. 1 Hov. 690. Ch. 21

And tho- he shd. have given while an infant a writ.  
in security, yet it is not absolutely void & prom-  
ise after full age will bind him, & original promt  
cont. being a sufft. consideration for & new promise.

The original promt cont. is not considered void, altho-  
& security & was. Bul. ni. pri. 155. Exp. sig. 164. 2 Bac. 134.

see p. 18. 29.

Secur., - if & written security was only voidable,  
for these, & promt cont. being merged, do not re-  
main as a consideration, for & last promise, but  
& new promise satisfies & security. \*

But in 4s. case & action might be on & writing, &  
& new promise replied to & plea of infancy.

But when & person after full age, makes a new  
promise, in consideration of a cont. made during  
infancy, he is bound no further than & promise ex-  
tends - Exp. 164. & a man promises to pay 50  
p. ct. of & Debt. (1 Bul. 155. 1 Rost 58. \*)

But in & last case, & new promises can hardly  
be considered, as a ratification of & original contract  
(as it varies from it) but rather a new substantial  
contract of wh. & original one is & consideration.

Decided in Count. Ct. of Exors, yt. an action  
on a note, given by an infant, is not suppo-  
ted by proof of a new promise.  
Did & Ct. consider & note void?

3 Bac. 132. n.

Decided by, same Ct. yt. an infants grant is void  
under Count. It.

Writ. of money into Ct. does not preclude & debt.  
from availing himself of his infancy. - For & ant.



of money so pd. may have been for necessities.  
1 Fols. 138. 2 Esp. Rep. 481. n.

If an adult, jointly interested with an infant  
in a lease, obtains a renewal of it, in his own  
name only, he shall be deemed to have acted as  
Trustee only - & the infant may claim his share  
of it, if it prove beneficial - secus. not -

1088. Bul. 408.

If an infant is accepted & sued on a cause  
of action to sh. his infancy is a good defence, he  
is not discharged on motion, as a gen. covt. but  
must plead his privilege, & be held to Bail.

103. 8. P. 380.

In Eng. the age of choosing guardians is sd. to be  
14. in both sexes. (i.e. by C. Law.) 1 Bl. 403.

In Cont. it is by St. 14 in males & 12 in females.

An infant may be an Executor at any age - even  
in "vacua sa more" - but can't act till 17. Very  
recently Administrators "durante minoritate" must  
be appointed.

1 Fals. 19. Office & Exc. 207. Barth. 466.7.

St. R. 138. Hob. 250.

Doller. 31. 100. 1. 255.

Too in Eng. by St. 28<sup>th</sup> Geo. 3<sup>d</sup>. he can't act till 21.

An infant can't be administrator till 21. For an  
administrator must give bonds, & an Exc in Eng. need  
not - & sh. he can't be able to do till 21 or full age.

Barth. 466.7. Com. 75. 257. 5 Co. 29. 5. 1169. 295.

In Cont. also, one may act as Exc., it is sd. by St.  
at 17. For he may then make a will.

Douglas 155. Barth 466.7.

By another St. every Exc. must give bonds -  
Also. he. an he can act till full age - As admr.  
cannot in Eng.

J. G. laid it down as a rule, y<sup>t</sup> in Conn. one  
can't act as admistr. till 21 in consequence of  
his obligation to give bonds, & sh. he d. not till age  
As in case of administrator (sup.)

I know not what is meant by betrothing - as it  
amt. to precontract, I don't know. It appears y.t. a fe-  
male was entitled to dower, on a betrothed husband's  
estate, if she be over 9 yrs. old at his death. By  
C. L. a female might be betrothed at 7 - but  
now betrothing is out of use. Lit. sec. 38. 2 Bk. 131,  
1 Bk. 460.

Age of consent to marriage from 12 to 14. But if  
one party is of 7 age of consent, & 3 other not, 3 for-  
merly consent afterd. as well as 7 latter.

1 Bk. 460.

But on a contract to marry in future, if one of  
2 parties is 21 yrs. old, & 3 other not, 7 former  
may be subjected for a breach of contract tho  
3 latter can't.

The age for disposing of personal property at  
will, in Eng. is according to some opinions 14 in  
males & 12 in females - if proved to be so suffi-  
cient - & according to others 15, 17, 18. The for-  
mer seems a better opinion. For they agree with  
the rules of Ecclesiastical Law wh. in Eng. governs  
in such cases.

2 Bk. 104. 469. 2 Bk. 318.

2 Bk. 497.

Rev. in Ch. 116. 1 Bk. 460.

By Court. H. 42. 3 age is 17 in both sexes, i.e. will of good. prop.  
but not of real prop.

What Contracts made by Infants are void, what voidable.

All contracts for infants not for necessities are  
generally void or voidable.

Cts. have lately inclined to construe y contracts of  
Infants as voidable only. Stra. 938. 1 Bk. 506. 2 Bk. 1805.

Those contracts in wh. there is a benefit or sen-  
simblance of benefit are voidable only, but those, in wh. there  
is no apparent benefit, or simblance of benefit, are  
void - this is 3 Genl. rule. Co. L. 502. 3 Bk. 310.

This rule is in its nature vague, & a) 1 Bk. 6. 318. 54. 1 Bk. 770  
better one may be found post. 2 Bk. 511.



The purchase of an infant are only voidable,  
as Jeffries &c. Co. Lit. 2. 3. 8. 2 Kent. 207.

- being in his benefit.

Bro. J. 320.

4th power of atty. made by an infant to accept  
a gift in his behalf is only voidable.

1 Roll. 730.

3 Bac. 136.

(Zouch vs. Parsons 3 Brev. 1808.)

4th Indenture, it has been held, by an infant  
slave to serve his master is voidable only

2 H. Bl. 511.

But a lease made by an infant not re-  
ceiving adequate rent is void.

Leon. 210. Ray. 150. Hutton. 102.

10 & 11 Mod. are not good authorities, 12 Mod. 162. 10 Mod. 421. 329, 330.

With regard to trifles reserved - see these weighty opinions. contra.  
Lit. 547. Co. L. 25. 308. a. 1 Lev. 6. 3 Bac. 304. 5 Bac. 335. void & voidable.  
In other cases leases by inf. are held to be voidable with any referents.  
Rent. 5 Bac. 335. This Lord Mansfield has denied & approved upon principle. &  
it is settled yet. an infant may make a demise to  
himself his title, & with. rent.

2d & 3d it is agreed by all, if an infant make a lease  
& infants lease can in no case avoid a lease, on acct.  
of infants in fancy, - this I think upon principle.

3 Brev. 194, 1806. 2 B. R. 161. 1 Term. 75.

1 Ch. 29.

1 Dou. C. 28.

1 B. R. 575.

4th - infant cannot in a above case plead "non est factum"

Bro. Elr. 857.

10 Co. 45. 530. 119.

If a bill of exch. is endorsed by an infant, & indorsee  
may recover of all prior parties, tho. not of the infant.  
The endorsement is only voidable & yet. only by the  
infant. Ryd. 172. 2 Esp. 587. Marshall on Ex. 675. 6.  
Park. in imp. 332.

It is sd. that a penal bond by an infant is void -  
as it can't be for his benefit. Co. Lit. 920.

Exp. sig. 104.

Hutton 100.

5 Bac. 334.

1 P. on C. 54. 1 H. 11728.

Other opinions seem inconsistent with this doctrine.

Co. Lit. 142. Lit.

Park. m. 12. 154.

1 Hodges. 302. 3 Bover. 1804. 5.

yt. an infant can't plea non est. factum see,

Salk. 279. Gid. 20. 152. 5 Co. 119.

note a letter of Atty

2 H. B. 515. La. R. 315. 200. on p. 59.

4th rule in Eq. is yt. if an infant having given  
a penal bond, for payt. of his debts & obligations a-  
ct. of Eq. will not payt. of the bond.

1 Eq. cas 582. 2. 1 Hodges. 302.

1 Fent. 74.

Better rule J. G. thinks sd. be to consider ~~only~~ voidable.

The first genl. branch relates chiefly to purchases  
by Infants, & if limited to them in its application  
seems agreeable to principle i.e. it is not contra-  
dictory to any settled principle or decided case, and  
there seems no reason opposed to it. The last  
branch embraces sales, conveyances & leases made  
& obligations entered into by Infants.

But as to sales, conveyances leases & obligations  
by infants, the rule of distinction seems to be  
4th. All gifts, sales, grants, leases & obliga-  
tions made by Infants & sh. so not take effect  
by delivery are void. Those sh. so thus take ef-  
fect, are only voidable.

Lit. sec. 289

3 Burr. 1804. 5

Park. 19. 12

1 H. 11728.

200. 10.



As for infant. by an Infant is voidable only. 3 Bac. 136.  
Co. L. 247. a. 280. 12th. 78. 4 Co. 148. a. Perk. sec. 259. 3 Bac. 1805. 8 Co. 92.  
How can y<sup>e</sup>. & y<sup>e</sup> subject. rules, be accounted for  
by y<sup>e</sup> first distinction, or even reconciled to it?

Perk. sec. 11. 1st ed. 157. Hobt. 77. Lach. 10 12th. 778

So if an Infant sell a chattel as a lease, or harge  
& deliver him, y<sup>e</sup> sale is only voidable, if not  
delivered it is void, & y<sup>e</sup> purchaser liable in  
Trespas for taking him.

The words "sh. take effect by delivery" are an es-  
sential part of y<sup>e</sup> rule, also as to deeds, & make  
a differ. between deeds sh. convey an interest, & those  
sh. delegate a power to convey. The first are only  
voidable, y<sup>e</sup> latter void. 3 Bac. 1804.5.

As Infants leases, releases &c. by deed are in  
genl. voidable only, they take effect by deliv-  
ery, i.e. by delivery convey an interest.

5 Co. 118. 12th. 78. 4 Co. 148. a. Perk. sec. 12. Lit. 1. 259.

Hence if an infant deliver a deed of convey-  
ance, & after he attains full age, delivers it  
again, y<sup>e</sup> 2<sup>d</sup> delivery is void (as a delivery) because y<sup>e</sup> first  
had y<sup>e</sup> same. 3 Bac. 1804.5. 12th. 78. 4 Co. 148. a. Perk. sec. 12. Lit. 1. 259.

It will however ratify y<sup>e</sup> deed I conceive "ab initio"

But a power of Attorney by an infant is void - it  
does not take effect by delivery. 1 Roll 790. 3 Bac. 1804.

Perk. sec. 12. Lit. 1. 259.

3 Bac. 1804.5. 12th. 78. 4 Co. 148. a.

Thus if an Infant give a power of atty. to another  
to convey his estate, he may treat y<sup>e</sup> purchaser, unde  
y<sup>e</sup> power as a wrongdoer, for entering under y<sup>e</sup> convey-  
ance. secus of a power of atty. to accept a lease.  
It is voidable only, for it is introductory to a purchase.

Mr. Povel however denies y<sup>e</sup> distinction between deeds con-  
veying an interest & those delegating a power.

Upon y whole, y Law, upon y<sup>s</sup>. head appears to me, No. 2.  
to be contained in y first branch of y first rule, Par. 8<sup>th</sup> field  
wh. chiefly relates to purchases by Infants, &  
is y 2<sup>d</sup> rule wh. relates to their grants, leases,  
obligations, &c.

The result seems to be y<sup>t</sup>. purchases by Infants  
are voidable only; y<sup>s</sup>. is according to y first branch  
of y first rule. & their conveyances &c. &c. are void-  
able only when they take effect by delivery, but void when  
they do not. They take effect. This is under y sec-  
ond rule.

Perhaps y rule, as to contracts taking effect by de-  
livery, tho it furnishes a genl. criterion, ought to be  
modified by y last branch of y first rule. Thus if  
an inst. privilege be not be suff<sup>y</sup> guarded by  
constituting y contr. voidable, when an interest pass-  
es by delivery, it will be void by way of exception-  
scus, it is only voidable. So says Id. Mansf.

3 Binn. 1847.8. 17 Bl. Rep. 579.

As case of an inf. agreeing to sell 2 ounces of  
iron hair, in wh. case y barber to obtain y 2 ounces,  
literally shaved y young ladies heads; In this  
case she lost an action of assault & battery, wh.  
was allowed to lie.

This is y only exception I know, & probably  
will not occur again. 3 Robt. 369.

Executory contracts by infants are genlly. void-  
able only, as a promissory note. 10 B. & C. 38.

Exp. 3. 154. 10 B. & C. 25. 154. 10 B. & C. 102. Marsh. & W. 175. 8 & Exp. 2. 155.  
That a promise of an infant is void, & y<sup>t</sup>. if an  
adult & an infant join in y promise y former  
may be sued alone - see ante. 5 Johns. 60. Park v. 302.

as to penal bonds. ante.



Acts of submission to arbitration by an infant  
is to be only voidable.

In some cases, these distinctions are momentous in  
practice.

### Effect of void and voidable contracts.

1. If a contract is void, 3<sup>d</sup> persons, or 3<sup>d</sup> adverse  
parties may take advantage of its invalidity.  
(as creditors may of a fraudulent conveyance)

If voidable only, 3<sup>d</sup> party for whose benefit it  
is made, & his representatives may take advan-  
tage of it. 5 Co. 42. 1 Do. 124. 1 Fortb. 74. 2 T.R. 603.

1 Str. 488. 2 Bath. 591. 3 Bac. 140. 5 Do. 337. 1 Hen. 841. 511. 3 Burr 1803.

If a voidable conveyance is made, of Real estate,  
only 3<sup>d</sup> original party <sup>or his</sup> <sup>representative</sup> in estate, as com-  
missioner or reversioner, can take advantage.

3 Bac. 142. 5 Co. 42. Co. L. 337. Roll 455.

2<sup>d</sup> - Voidable contracts may be affirmed by 3<sup>d</sup> infant  
after he obtains full <sup>age</sup> & confirmation may be exp-  
ressed or implied; as if a lease is made to an infant  
& he continues in possession after full age, & implicitly  
confirms it & makes it good, & he is liable for rent,  
& even for 4<sup>th</sup> wh. accrues during his minority,  
for he ratifies it "ab initio" - post 45. ante 20.

2 Bulst. 64. 5 Bac. 504. 1 Fortb. 151. 3 Bac. 155.

1 Roll 751. Co. L. 3. a. 2 Kent. 203. Bro. J. 320.

So if he makes a lease & accepts rent accrued after  
full age he thereby satisfies 3<sup>d</sup> lease - post 40.

Is any act evincing an intent to waive 3<sup>d</sup> priv-  
ilege of infancy or to confirm 3<sup>d</sup> contract has 3<sup>d</sup> same  
effect - 3 Co. 64. Co. Lit. 295. 170. Bro. J. 320.

2 Kent. 203. 1890.

But a void contract or act cannot be confirmed, it be- 38.  
ing a nullity - as a power of atty. by an infant to  
convey, or lease his land in pursuance of wh. a lease  
is made; here his act or declarations made after  
full age cannot ratify & lease (as where an inf.  
lessee takes a new lease of & same inst. neither in-  
creasing & terms, nor diminishing & rent, & second  
lease is void, & can't be ratified - 2 T.R. 766. 5 P. Sac. 336.

3 Co. 63. C. Edoug. 53. 1 H. Bl. 75. Coop. 201 (21) 482. 1 Atk. 351.

7 T.R. 83. 1 F. & M. 74. 1 S.R. 1728. 1 P. Cent. 33.

the infant having conveyed by com. recovery, or by  
fine, may avoid & conveyance by suit if error dur-  
ing his minority, but not afterwards, for his  
age only can be tried by inspection, by & Judges no  
overmt. to be tried by & Cog. is admitted vs. 3 R. 200.

Co. L. 280. 12 Co. 122. 3 P. Sac. 34. 135. 355.

1 P. Cent. 21. 3. 3 Mod. 229. 12 Mod. 197. 233.

It is d. yt. an infants conveyance, not by 39.  
matter of record, by matter "in pais" as by feoffment is  
avoidable either during his minority or afterwards.

Fitz. 192. Co. L. 247. b.

Co. L. 248. v. 380. But no rule has

been long since.

But it seems settled now, yt. a feoffment by an inf.  
cannot be avoided till after he attain full age; for  
his reentry is itself not binding & if conveyance orig-  
inal feoffment remains only voidable & may be con-  
firmed at full age - Ergo a stranger can't avail  
himself of a reentry by & inf. 3 Burr. 1794. 1838.

3 P. Sac. 116. 136. 1 Bl. R. 578.

2 T. R. 161.

The same rule obtains if & conveyance is by lease  
& release *ibid.*

2<sup>do</sup> if an infant make a lease for yrs. 2 T. R. 40.  
181. (this case is apt to mislead; it means yt an inf. is bound  
by his lease during minority.) 3 P. Sac. 137. 8. So Holden



by Les. Mansfield & Aldrich & by Court of Kings  
Bench, since. Co. Lit. 380. & Bac. 146.

Sales of pers. prop. by infants, are voidable at  
any time I suppose.

### Exempt cases in Equity.

Marriage settlement agreements made by Infants with  
consent of Parent or Guardian are in most cases bind-  
ing in Equity - such agreements being but acquiescence  
to a principal & primary contract. 1 Bos. & P. 524.  
34th. 58. Bos. & P. 182.

The Eq. assumes a sort of discretionary control over infants  
& directs their consciences according to 3 circumstan-  
ces of a case, enforcing many contracts which at Law are  
not binding. 1 Bos. & P. 50. 1. Bos. & P. 14.

Thus 3 inst. of a female infant in a marriage action has  
been held to be bound by such agreements made be-  
fore marriage - Baman v. 117. 3 Atk. 615. 1 Bos. & P. 54.  
& Chanc. Rep. 18. n. 2. 1 Bos. & P. 54.

It makes no diff. whether a wife's settlement is in  
possession or depends on a future contingency. 1 Bos. & P. 54.  
3 Bos. & P. 54. 1 Bos. & P. 54. 1 Bos. & P. 54.

So it is well settled y<sup>t</sup> a female infant may have her  
right of Power by accepting under such agreements a  
settlement by way of jointure, & even 3 settlement of pers.  
estate - This can't be done in Law.

Whether a male infant can thus bind his real estate (i.e.  
an estate of inheritance) it is not yet decided.

12. It has been decided y<sup>t</sup> a male infant lease for lives,  
was bound by such an agreement made with consent of  
Parents &c. 1 Bos. & P. 54. 1 Bos. & P. 54. 1 Bos. & P. 229.

And it has been holden by Ld. Mansfield y<sup>t</sup> if a female  
inf. seized in fee, covenants on marriage (with consent of Guar-  
dian and in consider<sup>n</sup> of a competent settlmt.) to convey her  
inheritance to her husband, &c., will execute y<sup>e</sup> agreement. =  
2 B. Wms 243. 1 Bos. & C. 48. = This says Ld. Hardwick is giving  
a great way, yet there are cases when y<sup>e</sup> Ct. will do it.  
viz. where a settlmt. by y<sup>e</sup> husb. is an adequate consider-  
n<sup>g</sup> y<sup>e</sup> wife leaves issue &c. 5 B. R. 613-15. 4 Wm. & A. 10  
1 Bos. & C. 50.

But by Ld. Thwylor, her real estate is not bound, 43.  
if she has a settlmt. & after her husb's death, takes  
posse<sup>s</sup> of it, & y<sup>e</sup> Ct. shd. not go into y<sup>e</sup> competency of  
y<sup>e</sup> settlmt. 5 B. R. 613-15. 1 Bos. & C. 50. 4 Wm. & A. 10.  
Ld. Thwylor then is of opinion, y<sup>t</sup> a subsequent satisfaction af-  
ter y<sup>e</sup> wife becomes married is necessary. 4 Wm. & A. 10.

These last authorities seem y<sup>e</sup> rule laid down by Lds. Mans-  
field & Hardwick. Upon y<sup>e</sup> whole Ld. Mansfield's  
opinion is much shaken if not overruled & there seems  
no differ. on principle between y<sup>e</sup> case of an agreement to  
settle an estate upon y<sup>e</sup> husb. during cool. or for his  
life (wh. may be deemed necessary by way of family pro-  
vision) & y<sup>t</sup> of an agreement to vest him with y<sup>e</sup> inherit-  
ance, wh. can hardly be supposed necessary for y<sup>e</sup> pur-  
pose.

At any rate, it seems agreed, y<sup>t</sup> any contract by a  
female infant to vend her real estate is not binding  
if made before marriage. 5 B. R. 56. 3 Bos. & C. 519.  
1 Taunt. 70.

The genl. question whether a male infant can bind 44.  
his estate by such an agreement is so. not to be settled.  
4 Wm. & A. 19.

But it is clear y<sup>t</sup> if on marriage with an adult he co-  
venants y<sup>t</sup> her real estate shall be settled to certain  
uses, he is bound by it for his own original estate is  
not affected by y<sup>e</sup> agreement, & she is of legal capac-  
ity to settle hers. 3 Bos. & C. 519. 1 Taunt. 70 & 4 Wm. & A. 19.



But no agreement made on marriage with an infant  
by an infant instant to settle his or her estate, will  
be enforced, nor it be fair & reasonable is upon ad-  
equate compensation.

2 B. & W. 129. 1 Port. 57. 50

1 B. & W. 57. 70. 1 B. & W. 115. 6. 15

3 B. & W. 615.

If an infant capable of making a will, bequeath  
pers. propy. for & paymt. of his debts his Executors  
bound in Eq. to pay them.

1 Eq. cas. 221.

1 B. & W. 403. 1 B. & W. 57.

2 B. & W.

1 B. & W. 79.

If an infant's contracts may be ratified at Law after  
full age (note 27.) so in Eq. a will made by a  
mother for an infant may be impugned as well as ex-  
pressly ratified by him after full age - Ex. lease of  
land (belonging to 6 children) for 40 yrs. by their mother,  
they having accepted & rent after full age. The Ct.  
of Ch. established & lease. 1 B. & W. 483. 3 B. & W. 120.

### What powers an Infant may execute.

If an Infant cannot execute a general power over real  
estate, from a supposed want of discretion, nor a  
power to appoint such person or persons as he shall  
think proper.

1 B. & W. 104. 1 B. & W. 235.

1 B. & W. 205. 47. 3 B. & W. 115.

But a naked special power an infant may ex-  
ecute, for here is a mere inst. having no interest  
wh. can be affected, for a naked power, is a  
power witht. interest, & no distinction is necessary  
as a power to convey. 1 B. & W. 235. 2 B. & W. 710. 12

1 B. & W. 210

1 B. & W. 210.

40. But an infant cannot execute a power over his own in-  
heritance, as it affects his own interest. tho a bene-  
vol. (at full age) may.

1 B. & W. 206. 1 B. & W. 206. 43.

Said in 3 Atk. 710. no precedent in a Ct. of Law or Eq.  
yt. a power over real estate may be executed by an  
inst. (3 Bac. 198. n.) This is too genl. a proposition, but  
must mean a genl. power. 1 Atk. 204.

Yess. on 4. 47.

The genl. rule seems to be yt. an inst. not inter-  
ested may execute a power so as to bind his principal  
to y extent of it, if it does not an t. to a discretion  
any power over real estate. ib.

And he may execute even a great power  
for pers. estate, tho his own interest is affected by it)  
if she enough to bequeath it by will - secus not. Ex.  
bequest of personal prop. to an inst. with power to  
dispose of part or y whole to whom he may think  
proper. 1 Bro. on Povers. 54.

And when an inst. tenant for life with 47.  
power to make a jointure. covenanted (in pursuance  
of y power) to settle a part of y land on his wife for  
life y covt. was holden good in Eq. & here y power  
was special. ib.

### What offices an Infant may hold.

The genl. rule is yt. an infant may hold a min-  
isterial office wh. requires only skill & diligence;  
but not a judicial one as he may be bailiff,  
steward, gaoler. The Judicial office is supposed to  
require judgment & discretion. Co. L. 26. Co. E. 326. 7.

3 Bac. 123. 125. 285. 286. - In the case it is sd. he can't be stew-  
ard of a ~~manor~~ manor. Dec. What office involves  
judicial power?

The reason given why an infant may hold a min-  
isterial office, is, yt. if he is incapable (as before he  
attains yr. of discretion) it may be executed by a  
deputy. 4 Atk. 274. ib. & 11 Co. 4. a

bro. Co. 277. 353



Qu. therefore whether he can hold any office wh. cannot be executed by deputy.

Qu. & as to y<sup>e</sup> Law of Court. - Can he hold any civil office? I am not apprised yet he can.

An infant can't be an Atty. for he can't be sworn as yet office requires - besides y<sup>e</sup> duties are attended with responsibility. 3 Burr. 125 n.

Nor can an infant be a Juror for y<sup>e</sup> same reason, & also I suppose because a Juror acts judicially. 4 Hobb. 325.

An inf. may be an Exec. at any age, but can't act as such till 17. - Pres. by St. 38 Geo. 3<sup>d</sup> - he can't till full age - ante 7.

49. Regularly an inf. Officer is bound by his official acts & liable for his neglect of duty. Ex. An inf. gaoler is liable for an escape & liable in debt if y<sup>e</sup> escape is upon execution.

3 Co. 27. 3 Mod. 222

Plood. 364, B. 2 T.R. 129.

How far an Inf. is affected by the non-performance of conditions annexed to his office or Estate.

Conditions are of two kinds express & implied.

1. By y<sup>e</sup> express conditions inf. are bound as well as an adult. Thus. If an inf. hold an estate, to wh. an express condition, imposing a forfeiture is annexed, & he fails y<sup>e</sup> estate by non-performance, as a mort. inf. heir to whom y<sup>e</sup> land has descended. 2 Vern. 520. 33. 340. 1 Leo. 21.

But there is an exception to this rule when a condition imposed a penalty, i.e. a forfeiture distinct from & loss of estate. In such case, & inft. is not bound to pay & penalty.

Co. L. 240. b. 1 Dist. 200.

Co. th. 49.

4th if a lease assigned or bequeathed an inft. under wh. lease was bound under some condition to pay double rent, the lease & his representatives may be subjected to & penalty, but not & inft.

2. Implied conditions at Co. L. are either founded on skill & confidence or not. 50. & Co. 97.

By & former of these an inft. is bound when a stewardship is granted to an inft. in fee, he forfeits & office of mismanagement. & Co. 146. 1 Dist. 82.3.

Co. b. 356.

By & latter infts. were not bound, as if an inft. lease for life alias in fee, there is no forfeiture, so of a fine coat.

& Co. 146. b. 1 Dist. 851.

Co. Lit. 238.

Infts. are barred by Stat. of limitation in there is a special saving in their favour.

Sts. of limitation are in nature of a condition annexed to a right.

1 Lev. 31. Pr. in Ch. 518.

1 Ry. cas. 204.

If an Exec. or donee does not sue within the time prescribed by & St. of limitations, when such a trustee has & power to sue, & inft. is barred.

1 D. Wms. 319.

This rule must relate to cases in wh. & Exec. has a right to sue in his own name, or a cont. in favour of & inft. rather than, or an obligation given to an executor & in trust to an inft. & not I presume to suits wh. must be brought in & inft.'s name & in his own right, for it would repeal & saving in & St.



In what manner infants are to be sued,  
& sue. i.e. By whom to appear.

I have already treated of y Rights wh. infnts. may acquire, & of y duties wh. they may incur by their own acts &c. We are next to enquire of y means of ascertaining these Rights & enforcing these duties.

Bro. J. 640. Palma. 225. 250. 303 ac. 199.

First. How Infants must sue.  
The infnt. must always sue by his guardian or Prochein Amy. He can't appear by atty. he can't appoint one - & he is supposed incapable of conducting a suit himself. 26.

If an Infnt. sue with his guardian, or Proch. Amy, y def. may defeat y suit by pleading to his disability.

2 Blk. 301. Carter. 193.

2 Lunde. 212. Co. L. 135. b.

Anciently an infnt. Plf. do. appear by guardian only, & not by his next friend in any case. But y St. of West. 182 enable Infants to sue by yr. next friends in certain cases i.e. in cases of necessity.

Bro. J. 640. Palma. 295.

Stue. 709. 303 ac. 149.

The causes in wh. an Infnt. may sue by next friend are 4. he says his

I. Where y Infnt. ~~has no~~ <sup>has</sup> Guardian. Hutton 92.

Bro. J. 640. 113 ac. 149.

II. When y suit is vs. a stranger, & y Guardian will not appear for him. 26 & Stue. 369.

III. When y infnt. has no Guardian. Co. L. 135. b.

IV. When he is eloiigned i.e. out of y care of a

Guardian. 100. 420. 610. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

In all y above cases, he is obliged to sue by next friend. In all other cases he must still sue by his Guardian.

According to some opinions, an Infant may sue in any case, by Guardian or next friend. By not y. taking away y Guardians control and authority.

If husb. & wife sue, y wife being an inf. she need not appear by Guardian, but both may appear by atty. named by y husb. he being adult.

When an inf. sues by Guardian, y latter is liable for y costs, & is compellable to give security for y same.

So when y suit is by his next friend, y latter is liable to costs, & both are liable to an attachment for non-payment. i.e. Guardian & next friend.

"Evid" 114. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

1 Phil. 46. 1 Wils. 130. 1 Stra. 306. 1026.

According to some opinions, y Infant is also liable for costs, & Def. may proceed vs. either at his election.

Gill v. 87. 2 P.W. 298.

This Rule laid down in P.W. was denied on a rehearing by Lol. King, who said there was no decision y. an inf. atty. was liable for costs in Law. Eq. & c. he need not find pledged at C.L. - 1030. 147. 1031. 148. 1032. 149. 1033. 150. 1034. 151. 1035. 152. 1036. 153. 1037. 154. 1038. 155. 1039. 156. 1040. 157. 1041. 158. 1042. 159. 1043. 154. 1044. 155. 1045. 156. 1046. 157. 1047. 158. 1048. 159. 1049. 150. 1050. 151. 1051. 152. 1052. 153. 1053. 154. 1054. 155. 1055. 156. 1056. 157. 1057. 158. 1058. 159. 1059. 150. 1060. 151. 1061. 152. 1062. 153. 1063. 154. 1064. 155. 1065. 156. 1066. 157. 1067. 158. 1068. 159. 1069. 150. 1070. 151. 1071. 152. 1072. 153. 1073. 154. 1074. 155. 1075. 156. 1076. 157. 1077. 158. 1078. 159. 1079. 150. 1080. 151. 1081. 152. 1082. 153. 1083. 154. 1084. 155. 1085. 156. 1086. 157. 1087. 158. 1088. 159. 1089. 150. 1090. 151. 1091. 152. 1092. 153. 1093. 154. 1094. 155. 1095. 156. 1096. 157. 1097. 158. 1098. 159. 1099. 150. 1100. 151. 1101. 152. 1102. 153. 1103. 154. 1104. 155. 1105. 156. 1106. 157. 1107. 158. 1108. 159. 1109. 150. 1110. 151. 1111. 152. 1112. 153. 1113. 154. 1114. 155. 1115. 156. 1116. 157. 1117. 158. 1118. 159. 1119. 150. 1120. 151. 1121. 152. 1122. 153. 1123. 154. 1124. 155. 1125. 156. 1126. 157. 1127. 158. 1128. 159. 1129. 150. 1130. 151. 1131. 152. 1132. 153. 1133. 154. 1134. 155. 1135. 156. 1136. 157. 1137. 158. 1138. 159. 1139. 150. 1140. 151. 1141. 152. 1142. 153. 1143. 154. 1144. 155. 1145. 156. 1146. 157. 1147. 158. 1148. 159. 1149. 150. 1150. 151. 1151. 152. 1152. 153. 1153. 154. 1154. 155. 1155. 156. 1156. 157. 1157. 158. 1158. 159. 1159. 150. 1160. 151. 1161. 152. 1162. 153. 1163. 154. 1164. 155. 1165. 156. 1166. 157. 1167. 158. 1168. 159. 1169. 150. 1170. 151. 1171. 152. 1172. 153. 1173. 154. 1174. 155. 1175. 156. 1176. 157. 1177. 158. 1178. 159. 1179. 150. 1180. 151. 1181. 152. 1182. 153. 1183. 154. 1184. 155. 1185. 156. 1186. 157. 1187. 158. 1188. 159. 1189. 150. 1190. 151. 1191. 152. 1192. 153. 1193. 154. 1194. 155. 1195. 156. 1196. 157. 1197. 158. 1198. 159. 1199. 150. 1200. 151. 1201. 152. 1202. 153. 1203. 154. 1204. 155. 1205. 156. 1206. 157. 1207. 158. 1208. 159. 1209. 150. 1210. 151. 1211. 152. 1212. 153. 1213. 154. 1214. 155. 1215. 156. 1216. 157. 1217. 158. 1218. 159. 1219. 150. 1220. 151. 1221. 152. 1222. 153. 1223. 154. 1224. 155. 1225. 156. 1226. 157. 1227. 158. 1228. 159. 1229. 150. 1230. 151. 1231. 152. 1232. 153. 1233. 154. 1234. 155. 1235. 156. 1236. 157. 1237. 158. 1238. 159. 1239. 150. 1240. 151. 1241. 152. 1242. 153. 1243. 154. 1244. 155. 1245. 156. 1246. 157. 1247. 158. 1248. 159. 1249. 150. 1250. 151. 1251. 152. 1252. 153. 1253. 154. 1254. 155. 1255. 156. 1256. 157. 1257. 158. 1258. 159. 1259. 150. 1260. 151. 1261. 152. 1262. 153. 1263. 154. 1264. 155. 1265. 156. 1266. 157. 1267. 158. 1268. 159. 1269. 150. 1270. 151. 1271. 152. 1272. 153. 1273. 154. 1274. 155. 1275. 156. 1276. 157. 1277. 158. 1278. 159. 1279. 150. 1280. 151. 1281. 152. 1282. 153. 1283. 154. 1284. 155. 1285. 156. 1286. 157. 1287. 158. 1288. 159. 12



charged, shd. be reserved to y settlement of y Guardian's accounts.

If costs can't be given it will be worse, i.e. vs an infant *plff.* 2 Stra. 1217. Burns 105. 128.

If Inf. def. is clearly liable for costs. For whenever he is subjected, he is deemed to be in fault, in withholding y *plff's* rights.

Exp. 104. 1 Stra. 1217. 122nd. 189.

That y Guardian on record of an inf. Def. is liable for costs. True? If so he is liable in y present instance; For when Inf. goes vs. one as Def. he is always in fault. This not law & there is no authority to support it.

Exp. 89. 104.

In Eng. both y Guardian & Prochein y King must be admitted to appear by y Ct. or by writ out of Chy. y. y. inf. may not be injured by acts of an improper representative.

Exp. 104. 1 Stra. 1217. 122nd. 189.

3 Atk 603. 1 Stra. 1217. 122nd. 189.

When suit is by Guardian, y County Ct. I believe, never enquire into his qualifications; But if by next friend, he is admitted by the Ct. - tho a tacit admission, it has been so, is sufft. True, how? 12th. 410. 413. 3 Ct. Rep. 584.

59. Any one may bring an action as next friend, for an inf. & even with y *plff's* consent, for he does it at his own hazard. 12y. cap. 72.

1036. 464. 2 Bac. 580. 190. 149. 51.

But tho he commence y suit, he may be dismissed by y Ct. If an inf. an adult or executor, in an action lost by ym. both may appear by Atty. for y suit is in "ante facit" & y adult may make an Atty. for both. In y case, y action being in another's name, y Inf. is liable for costs. 2 Saunders. 212-13. 1 Vent. 102. 123.

decide if they are sued as Exors, for in y<sup>e</sup> case, y<sup>e</sup> proceeding is to y<sup>e</sup> "in They do not voluntarily join as coparties & y<sup>e</sup> bringing a suit, does not imply any admission by either of y<sup>e</sup> y<sup>e</sup>l. they are actually co-executors. Besides y<sup>e</sup> inst. Deft. might be otherwise subjected to costs "de bonis propriis" by mispleading.

3 Mod. 236. 11m 379  
1 Bac. 151 201 ex. 432.  
Gelb. 150 11m 748.

So it is - Id. Co. E. 542. - If an inst. sole Exor sue alone, he is liable for costs. This rule is denied & seems not Law.

Co. E. 542.  
1 Bac. 150. n.

Even if y<sup>e</sup> original Judgt. was for y<sup>e</sup> Inst. as y<sup>e</sup> Co. L. 11. 2 saved. 213. n. Contra. Co. J. 441. argued.  
1 Vent. 182. 11m 125. 11m 257.

## Second. How Infants are to be sued. 60.

4th Inst. Deft. must always appear by Guardian, & not by Pochein Atty. See y<sup>e</sup> 11. 182. Deft. do not extend to actions vs. Infants.

1 Bac. 148. 2 Co. 680. Palm. 225. 250. 740. 266.  
Co. J. 640. Hutton 92. Co. Lit. 151.

If an Inst. appears by atty. or by himself when he ought to appear by Guardian, it is erroneous. This plea is signed by y<sup>e</sup> Guardian & y<sup>e</sup>l. is what is meant, by pleading by Guardian.

Note. By y<sup>e</sup> Guardian, in y<sup>e</sup> genl. rule is meant, not y<sup>e</sup> Guardian of y<sup>e</sup> Inst's person or estate, but one appointed for his suits - in genl. by tellow patent - out of Chy. - or one appointed by y<sup>e</sup> Ct. in wh. y<sup>e</sup> suit is brought.

Co. L. 135. b. n. 2 Bac. 87.

And in an action vs. husb. & wife - y<sup>e</sup> wife being



an infant. she must appear by Guardian.

3 Bac. 150. 1 Mod. 288. 1 Vent. 185. 2 Lev. 58. 2 Hob. 878. 1 Rep. 91. 110 "H. & M. f.".  
This being next friend does not enable him to  
act for her as next friend. The next friend cannot app-  
oint an attorney for both.

Leave if she is of age or if she be baptiz'd.

1 Vent. 185.

61. If an infant having no Guardian is sued, & it  
must appoint one "pro se natus" such an one  
is called Guardian "ad litem". 3 Bac. 159. 50 n. 1 Stra. 309.  
5 Co. 59. 6 Co. 2. 89. 150 5. 2 Lev. 150. 304. 327. Post 173.

If there be Guardian appointed, & Judge, &c.  
be erroneous. The authority of a Guardian "ad  
litem" extends only to a suit in which he was app-  
ointed.

But if a Infant has a Guardian, & it. cannot  
appoint one "ad litem" in a former suit, & it  
such a process, or has misdeemeaned himself.

3 Bac. 150 n. 1 Sid. 524.

1 Stra. 426. Still 456.

If there be an infant having a legal guardian is  
sued & latter shall be summoned to defend  
for him. The process however does not avail, if  
a Guardian is not summoned. That time is given  
in to cite him to appear.

62. If an infant when sued, appears by attorney, &  
Judge is given vs. him, this is erroneous, & a. writ  
by error "coram obey" lies. 3 Bac. 149. Mod. 665. Inf. 640.

Butler 92. 2 Bac. 218. Yelv. 58.

So if his Guardian is not cited & Judge goes vs. him  
as defendant this is erroneous. 11 Co. 116.

63. It seems if an infant appears by attorney, &

final judgt. is given either to one or another inf. the  
Error at C. Lac.

2 Bac. 130. 1 Roll 287.

Carth. 125.

2 Saund. 215. n.

If judgt. for him, <sup>but</sup> weight of authority is vs. vs.  
opinion in Cro. J. 441.

This rule is now altered by a. st. 21 J. 1 &  
4. 1800. so if judgt. pass for inf. upon verdict, of  
other party cannot reverse it. 3 Bac. 139. n. 150. n.

2 Saund. 212. 1 Bac. 94. Cro. J. 580. 2 Bac. 198.

In these st. nothing is so. if demovr. it is as at C. L.  
But notwithstanding these st. his injury is still pleaded in a. st.  
nt. in these cases.

Carth. 123. 2 Com. Rep. 387.

If an inf. is sued with others who are adults &  
appear by atty. & entire a. st. damages are given  
vs. him, & whole judgt. is reversed, for 7<sup>th</sup> Ct.  
cannot absolution damages. 2 Bac. 198. 228. Cro. J. 288.

Carth. 167. 1 Roll. 770. Sta. 306. 39. 2. 535.

9<sup>th</sup> ltr. If damages are severally assessed judgt.  
is then reversed, ground of inf. only for vs. is sub-  
stantially the same, as if there had been several  
distinct judgements.

3 Co. 38. Sta. 189. 808.

3 Brown. 222. 1 Roll 747. 776.

The Court. it has been determined, if when 6<sup>th</sup>.  
several & infants are sued together as resp-  
sives (or Guardian not being cited & all appearing  
by atty.) the judgt. vs. ym. is reversed, ground  
of inf. only tho' damages were entire a. st.

Kim. 106.

Que. In the each is liable for y. whole & there is no consid-  
eration, yet if y. adult had been sued alone of inf. ap-  
pear. of damages might have been made, inf. may have been ringled &c.

If in 9<sup>th</sup> Court & inf. were sued alone as Co. Exors.  
of inf. must appear by Guardian. 3 Bac. 157.

Stile 318. 3 Mol. 236.



If an inf. and adult join in a fine it may be re-  
vised quoad 3 inf. only - 3 Bac. 229. Hob. 278.  
m.d. 555. 2 Leon. 108.6. Bro. E. 115. 124. Because the  
interests are distinct, & it is in y native to a com-  
mon assurance or conveyance.

### How far the Law regards Infants in "Ventre sa mere".

Infants in ventre sa mere are to many purposes  
regarded in spe. They are now considered so in  
many cases in wh. they formerly were not.

1 B. & C. 130

The killing of an unborn inf. is now not mur-  
der, but a high misdemeanor or misprision.

3 Bac. 665. 3 Bl. 159. Hawk. 121.

But if y child having received a mortal wound  
or injury in ventre sa mere is born alive &  
then dies of y wound within a year & a day, after  
y infirm. born, it is homicide by man, be never  
born. The child is regarded in spe for y. burial.

4 Bl. 197. 8. Hawk. 121. 3. Inst. 5.

1 Hale 433. contra.

An inf. in ventre sa mere may take by devise as  
y Law now is. 3 Bac. 124. Fearn 428. 32 Co. Lit. 11. b. n. 4

4 B. & C. 215. 1 B. & C. 2. 643. 2 Milb. 225. 3 Do. 326. Carth. 309.

1 Ves. 114. 3 T. R. 395. 1. Talk. 228. 1 Lee. 153. 1 Leo. 138.

1 P. W. 480. 1 Do. Ch. 384. 2 P. W. 28.

Let it a Legacy. 1 Do. Ch. 384. 8. 1 Do. 1036. 130. 1 Do. 233.  
for y distinction, see "Devisees" 58. 72.

Till y birth of y devisee, y estate descends to the heirs  
& is then divested in favour of y posthumous devisee.

2. 4 Mod. 9. 1 P. W. 486. 2 Do. 28. 1 Ves. 114. 1 Do. ch. 386.

3 T. R. 425. 1. 1 Leo. 135. 4 Mod. 174.

An inf. in ventre sa mere, may take under y  
of distributions. 2 P. W. 340. Barn. 290. 2 4th. 117.

So under a term for raising portions for such children 67.  
as A. shall have at his death. posthumous pro-  
nata habita. 2 R. Ch. 50. 1 D. 11. 290. 2 74. 331. 358.

So under a bond in favour of such children, at  
sup. & an injunction vs. waste lies in behalf of an  
infant in ventre &c. Ex. & an estate limited to A. for life,  
remainder to y unborn child of B. an injunction lies in fa-  
vour of such unborn child. 2 Vern. 710. 3 D. Ch. 50.

2 Atk. 117. 3 Bac. 123.

Under St. 12 Car. 2 an infant "in ventre sa mere" may  
have a testamentary Guardian, i.e. one appointed by  
y father, by will or deed. 1 D. Ch. 130. 252. 6.

& an infant in ventre sa &c. may be an Exor., but cannot  
act till 17 & if two are born, they shall be co-  
exors. 3 Bac. 123. 1 D. Ch. 235. 5 Co. 19. Wentworth. 307.

But now by St. 28. Geo. 3 not till full age. ante 7.

So if one devise or bequeath to  
y unborn child of A. & two or more are born, they take  
jointly. 3 Bac. 123.

## Of y Relative Rights & Duties of Parents & Children. 68.

The enquiry under y head renders it necessary to consider  
y distinction between legitimate & illegitimate or bastard  
children for y rights & duties are diff't. when referred  
to these two classes of children.

First then, who are legitimate, & who bastard chil-  
dren? A legitimate child is defined to be one born  
in lawful wedlock, or within a competent time afterwards.  
1 D. 1. 455. Co. L. 234. Co. F. 341 - i.e. no other than a child  
thus born can be legitimate - But it is not uni-  
versally true "e converso" yt. every child thus born is legi-  
timate, tho prima facie, he certainly is. 43 p. 483.  
1 Atk. 457. 5 Co. 58. b. Moor. 990.



69. An illegitimate child is defined to be, one begotten or born out of lawful wedlock - 1 Bl. 451. In other words, not begotten or born during lawful wedlock.

This definition I conceive is incomplete, for suppose it after y conception, y Parents intermarry & it y father dies before y birth y child is illegitimate according to y above definition of a legitimate child.

The true definition is - yt an illegitimate child is one begotten out of lawful wedlock, & not born either during lawful wedlock or within a competent time afterwards. or one neither begotten, nor born in lawful wedlock, nor within a comp. time aft.

70. The above defn of a legit. child, amounts only to, yt. if a child is born during lawf. wed. &c. y presumption is, yt he is legit. - ~~He~~ is "prima facie" so. 1 Bl. 451.

This presumption is very strong. Hence anciently no other proof of illegitimacy was admitted in such a case, than such as rendered legitimacy impossible. & y fact of illegitimacy, &c. is proved only in two ways - 1<sup>st</sup>. By showing impossibility of access to y wife by y husb. - 2<sup>d</sup>. By showing his incompetency - Co. L. 244, & Co. 98. 2<sup>d</sup> Str. 176. 940. 1 Bl. 457. Salk. 123.

Improbability, however strong, was not sufft. to prove y fact. Esp. 2. 482.

71. 1<sup>st</sup>. 780 other proof of non access was admitted formerly, than yt. if y husband's absence "extra questionem" from y time of conception to y birth - Co. L. 244. Salk. 122. 1 Roll. 358. 1 Bac. 310. Esp. 2. 483. Ld. Rd. 395. Salk. 123. 483.

absence within y realm was not legally probable.

1 Bac. 311. Salk. 122. 1 Bl. 457.

Hence if y husb. had been absent for any length of time, & his wife shd. have a child however soon after his return, y child &c. have been legit. in y husb. was proved impotent.

So if after an absence beyond sea for 20 yrs. he shd. return & marry a woman who shd. be delivered next day, & child shd. have been legit. in utero.

Co. Lit. 244. a. Falk. 125. 584.

5<sup>th</sup> Roll. 785.

2<sup>d</sup> - As to y husband's impotency - Formerly y<sup>t</sup>. fact 72.  
shd. not be proved otherwise than by want of age.

1 Bac. 310. 1 Roll. 358. Co. L. 244.

According to some, y age of impotency, is any age, under 14. according to others, y age of 8 is y limit.

1 Bac. 310. Co. L. 244. n.

1 Roll. 358. 1 Bl. 47. 457.

The evid. admissible under these rules is supposed to prove y impossibility of legitimacy -

No rules similar to y above have been adopted in Court, & then old rules are now abolished in Eng<sup>l</sup>.

1<sup>st</sup> These acc<sup>ts</sup> may now be proved by other evid. than y<sup>t</sup>. of absence "extra quatuor maria". The question is left to y Jury upon y special circumstances of y case, & they may find no acc<sup>ts</sup>, tho y husb. has been within y realm - Co. Lit. 244.

5 Mod. 119 3 D. Wms. 275

Str. 925. 4 D. 584.

2<sup>d</sup> - Impotency may always be proved by other evid. 73.  
than want of age &c. as by y husband's state of health by any evid. in that wh. conduces to prove the fact.

Exp. 8. 483. Str. 940. 1 Bac. 311.

These rules also seem to admit no other proof of illegitimacy than what amounts to an apparent impossibility &c. Exp. 8. 483. Str. 940.

It has been lately settled that other evid. y<sup>t</sup>. of non-acc<sup>ts</sup> & impotency is admissible to prove illegitimacy, Ex. y<sup>t</sup>. y mother co-habited with another & y<sup>t</sup>. y child was reputed a bastard - y<sup>t</sup>. it was called by y name of another, & y<sup>t</sup>. mother took his name &c. Co. L. 594. 4 D. R. 350. 4 D. 584.



This evid. goes to prove improbability only & child is legit. It is not direct proof of non-access or impotency.

(\* 7 Supp. . Roll 582.50.)

The issue of a marriage wh. is null "ab initio" is illegitimate - so in case of a total divorce & can exist existing before marriage & rendering it unlawful.

(\* . 36. 420. 440. 550.)

But the legality of a marriage not absolutely null & void, can be called in question & owing to living of parties "pro salute animarum". As is the case with those marriages wh. are made void by reason of some canonical impediment & reason of y<sup>e</sup> divorce are granted & marriages annulled in y<sup>e</sup> spiritual Ct. "pro salute animarum" but y<sup>e</sup> can't be then one of causes - This rule is confined to those marriages wh. are unlawful by reason of some canonical imped. i.e. when divorces are necessary to prove y<sup>e</sup> illegitimacy it is necessary only in cases of consensual imped. 1836. 550.

In civil disabilities, legitimacy may be denied at any time - Some soon owing to stock can't be bastardized &c. by proof of illegality of y<sup>e</sup> marriage after y<sup>e</sup> death of either of y<sup>e</sup> parents. 1836. 550.

But a child may be proved actually illegitimate after y<sup>e</sup> death of its parents, tho' born during lawful wedlock, by other causes, as is frequently done.

A child begotten & born after a divorce "a mensa et thoro" is presumed to be illegitimate, because y<sup>e</sup> parties are presumed to have conformed to y<sup>e</sup> divorce, wh. way to live separate, & wh. prohibited them from co-habiting together. But when there is a voluntary separation by husband & wife under articles of separation, if a child is born it is presumed to be legitimate, because there is no presumption of y<sup>e</sup> conform.

ment to their own voluntary consent. - But the presumption  
in both cases may be rebutted. 1 Bl. 437.

When a question of legitimacy <sup>depends</sup> upon a pt. of 75.  
non-accept. of wife is not admitted to prove non-accept.  
This rule is founded (says Ld. Mansf.) "in decency,  
morality, & policy". It is in saying policy of law,  
because it might give offence to a husband. - It may be  
proved however by a testimony of others - But she is  
admitted, & is a good witness to prove an intimacy  
with others & so arises from a necessity of a case;  
for she may be the only person acquainted with a fact  
notwithstanding a rule of decency & morality.

2 Sp. R. 485. Cowp. 2. 544.

1 Wils. 340 2 Bul. ni. pr. 112.

Both a husband & wife are comp. witnesses to prove the  
time of a child's birth - So they are comp. witnesses  
to prove the time of marriage & the fact of marriage.

So declarations of a father & mother as to a child  
being born before a marriage may be proved after  
their death - This is not bastardizing one born un-  
der a wedlock, nor does it impeach a marriage of  
parents.

So a declaration by either in Chy. is good evd. of a  
fact. 76.

So tradition, common representation, an entry in a fam-  
ily Bible, inscription on a tomb stone, are good evd. of a  
child's birth, as they are upon questions of Pedigree.

By a civil & canon Law a child born out of mar-  
riage is legitimated by their subsequent marriage.

Not so by a b. l. or our own. 6 Co. 63. 1 Roll 624.

1 Bl. 454. 6.

So all children born of a widow, so long after  
her husband's death, as by a usual course of gestation



They can't be his issue, are bastards. They are born within a competent time after marriage.

13 Blk. 456. Co. J. 541.

What is the competent time mentioned in the definition, & how soon exactly ascertain i.e. within what time after the husband's death, a child must be born to be legitimate.

Accordg. to some opinions, 9 solar months & 10 days is the usual time of gestation i.e. allowing 30 days for a month - 280 days, or averaging 4 months of a year 285 days - accordg. to others 40 weeks, 280 days.

Co. Coke says 9 months or 40 weeks are the farthest limit Co. Lit. 123. n. 13. This subject within a few yrs. since has been examined by eminent physicians. It is agreed that the usual time may be hastened or prolonged by various causes. Co. L. 123. b. n. 132.

13 Blk. 456. Palm. 9. Co. J. 541. 1 Roll 356.

The rule is that a child born within the usual period of gestation, computing from the husband's death, is legitimate i.e. presumed to be so, as if born during wedlock.

A child born after the expiration of the period, is presumed illegitimate. But the presumption may be rebutted in both cases. 1 Bl. 456. Palm. 9.

Co. Lit. 8. Co. J. 541 1 Roll 357. Paul. n. pri. 114.

Exp. dig. 485.

But one born 9 months & 13 days aft. has been held legit. & mother having suffered much hardships.

No one born 9 months & 20 days aft. under special circumstances.

If a woman marry immediately on the husband's death, & a child is born within such a time, yet accordg. to the usual course of gestation, it may be a child of

either husband or she may, when of y age of discretion,  
choose either to be his or her father.

Co. Lit. 8. Roll. 557. 136. 550.

But he can't, I trust, if satisfactory evid. of his true por-  
centage can be obtained. The rule supposes y absence  
of any other proof, - y. sh. is furnished by y truly  
supposed illeg. statement.

It is so. y. t. one may not be bastardized, i. e. pro-  
ved to have been a bastard - after his own death  
as "Pers. defects &c with y Person". 7 Co. 44. Jenk. 268

Co. Lit. 33. a. 255. 1 Bac. 315.

But y holds only up between a bastard "Eigne & mul-  
tier puisne" i. e. between a son born before mar-  
riage of his parents, & y Lawful Issue of y Mar-  
riage. Walk. 120. 88p. 2. 550. 3 Lev. 310.

Bastardizing, by impeaching a void or voidable  
marriage is a distinct thing.

If then a bastard Eigne, enter upon his father's  
estate, & dies seized, his issue shall hold to y  
exclusion of y mulier puisne. 7 Co. 44. Jenk. 268.

Co. L. 33. a. 255. 1 Bac. 315.

But to exclude y mulier puisne, there must  
have been an uninterrupted possn by y Eigne  
& a descent to his issue. Hence during his  
life, y legit. son or mulier puisne may evict  
him.

And if y legit. son die with issue, y estate  
goes to y mulier puisne or legit. son, even in  
exclusion of a posthumous child by y bast-  
ard Eigne. Because y possn was not in y bastard  
and ~~issue~~ posthumous child.



## Of the Rights & Incapacities of Bastards.

The rights of an illegitimate child are such only as he may acquire, for being "filius nullius" or "filius populi" he is not of kin, it is sd. to any one but his own issue, as it respects inheritance, & none can inherit nothing. 1331. 438. 9.

But y<sup>e</sup> maxim, yt he is "filius nullius" does not hold us to all purposes, for it does not extend to a marriage within y<sup>e</sup> prohibited degrees - An illegitimate child must marry his mother or daughter. 1331. 353. 3. & 1160. 108. Ld. R. 2. 68.

Cumb. 305. Com. R. 2.

In case y<sup>e</sup> maxim extends to cases, in wh<sup>ch</sup> Law requires y<sup>e</sup> consent of y<sup>e</sup> father or mother to a marriage of y<sup>e</sup> child; here y<sup>e</sup> Law recognises y<sup>e</sup> relation of parent & child. If conceive y<sup>e</sup> consent of y<sup>e</sup> father of a minor illegitimate child is necessary to his marriage, when he is known - he being compelled to support it.

1 J.R. 20. 100. 1 J.R. 20.

It is sd. yt. a mother's consent is necessary. but y<sup>e</sup> seems not Law - Her consent has often of late been held void. by Sir Wm. Scott (Judge of y<sup>e</sup> Ct. of Bishops of London) & other civilians - 22 Chanc. Observer. 580. 1 Haggard. 337.

4 Quest 1. 1331. 358. n. 11. 1 Bott 359. 200. 85.

Indeed y<sup>e</sup> maxim of "nullius filius" seems to apply to the Law of inheritance - Jus. Biol. (1 J.R. 101) So. by Littleton yt a bastard is quasi nullius filius. because he can't inherit. Ld. R. 128. Com. R. 122. 1331. 438. 9. 1 Bac. 309.

82. A bastard may acquire a sur-name by reputation, tho' he has none by inheritance. 1331. 458. 9. Co. L. 3. A bastard may purchase by his name thus acquired, as by y<sup>e</sup> name of G. Brayton. Co. Ld. 3. 1 Sir. 194. Po. 3. 319. 33. 23. 313. Park. 20. Jark. 239. 1 Bac. 309.

So Brayton bastard may purchase by y<sup>e</sup> name & description

of y. y. t. Brayton, he having gained y reputation of be. y. 3  
ing y. y. t. B. son. 200. 335. 1 y. 4th. 410. Mod. 10. 5 Co. 55. Par. 8. Child.  
2 Roll. 43. 4. Co. Lit. 3. b. 1 Bl. 385.

By y description of "issue" a bastard can never take, as  
it seems. (Co. Lit. 3. b.) because, I suppose, "issue" is  
genly. used as synonymous with "heir" & "body" &  
he cant be heir in any sense. Co. Lit. 3. b.

But a bastard can gain a sur-name by reputation &  
y reputation of being child to y. y. B. but by continuance of  
time. Co. E. 310. Pow. 2. 300. 9. Co. L. 123. 3 Co. 55. 10. 11. 329.

1 Bac. 309.

Hence if a contingent remainder is limited to the el- 83.  
est son of y. B. (he having none at y time) whether legiti-  
mate or illegit. & he aft. has an illegit. son, he cant  
take, for he has not y reputation of being y son of y. B.  
at his birth, & it is uncertain whether he can will. The  
contingency ergo is too remote - Co. E. 310. 1 Co. 65.

Co. L. 3. b.

But it has been sd. yt. such a limitation i. e. con-  
tingent remainder limited to y elder son of y. B.  
will enure to his bastard son aft. born, because he  
acquired y denomination of her child by being born  
of her, so yt. there is never any uncertainty as to  
y person intended. 1 Bac. 309. May. 33. 5.

If uncertainty in y person is y only objection it  
seems avoided in y case by y limitation wd. seem  
good.

What say. Is it not limited on too broad a 84.  
contingency? allowing yt. there is no uncertainty as  
to y husb. when born, is not y future birth of a  
bastard itself "potentia remotissima"? Hargrave  
leaves it in dubio tho from his note y better ob-  
jection seems to be is. y limitation.

A bastard can have no heir, but those of his son





are both chargeable for child's support. 1 Ed. c. 488.

Comm. R. 99. 100.

### The Mode of Proceeding.

On complaint made to a magistrate by a mother, under oath, - he issues a warrant to apprehend person charged. -

He is brought before a magistrate, who enquires into the truth of the charge & in his discretion, may bind over a person accused to the next county Ct. if the child is born for trial - The county having penal jurisdiction of the cause, he ought to bind over, if the prosecution appears perfectly groundless. - 1 Phil. 267. -

On the enquiry, as on final trial, a mother is allowed to testify "ex necessitate rei" - Comm. H. 54. 2 Ju. 209.

The process issued by a magistrate, is a "forthwith" form of prosecution is criminal - the object is civil. -

It was once genly. supposed that a complaint must be made before birth, or a mother has no remedy - It has been decided contra. 88.

The mother's oath is not conclusive, but it is "prima facie" evid. & of course throws the burden of proof on the deft. The swift denial by plea, is no avail vs. her oath, but he may contradict or invalidate it by other evid. as in other cases.

He must also be put to the discovery of the truth in time to her <sup>travail</sup> trial. 1 Root. 107 Com. H. 54.

The omission of the last requisite can be supplied by no other evid. 89.

Does when a select-men of a town prosecute, or a town sd. be at the mercy of a mother & consequence sd. be a collusion between father & mother. Bay. 278.

In the state a select-men have the same power to



prosecute, as y Parish in Eng. but it is more frequent for y mother herself to complain.

The St. requires yt. she continues constant in accusations, she must not charge one before the magistrate & another before y county Ct. "constant" has been decided to be a free requisite -

It is necess<sup>y</sup> to be alleged in y complaint - it is not more evid. - it is absolutely necess<sup>y</sup>. & even y confession of y Father out of court is not sufft. because there is a presumption of Law wh. cant be rebutted. Ct. St. - J. Reeve. contra

90. If y Sept. is found to be y putative Father, y Judgment. is yt. he find security for y payt. of y damages assessed & also (if it be required) to save the town free from charge for its maintenance, when y mother dies, & if he refuse to obey y<sup>s</sup>. order, he is to stand committed - St. Count. 54. - - When the town sues, he only indemnifies y town - This judgment is called in Eng. an order of Filiation. 3 T. R. 373.

No such security is ever required of y mother, because she wd. probably be required (obliged) to go to Gaol.

But y order to stand committed, has often been omitted in Count. & y omission was judged no error - But in these cases, executions are issued quarterly. 1 Count. 417.

The damages given according to y Count. practice, are usually for y support of y child till it is 3 yrs. old, together with y child-bed expenses. Kirb. 268. -

Qu. as to these expenses - 5 Mass. R. 519, 220, 186. But y period wh. y damages are to cover are not uniform - Constock vs. Wile 2 Vt. R.

91. If y child die before y expiration of y time fixed, y subseqt. executions are stayed -

On the other hand, if the expenses exceed the damages, the father is compelled to pay more, & the necessary additions will be inserted in the remaining execution - on application to the county Ct. or Ct. com. pleas.)

If the child is not born before the rising of the county Ct. to sh. the debt. is bound, the Ct. will order a continuance & renewal of the bond. St. Court. 33.

If the woman die or marry before delivery, or suffers an abortion, the debt. is discharged - 1 St. 558. vis. 1. 211. yet if she marry before the recovery, the husband can't join in the prosecution. - See qu.

The Bond or recognisance taken by the magistrate is conditioned to be void on default appearing &c. & answering final judgment. - Kirby 217.

In this case the security is not discharged, under the bond. St. of Limits as to Bail till a year has elapsed from the time fixed for the last quarterly payment. St. Court. 68. Kirk. 267.

If the mother does not prosecute, the select-men of the town (in bond.) entrusted in the support of the child, may prosecute for the town & oblige the father to give security to save the town free from charge - if he voluntarily does it, for in the case, prosecution wd. be unnecessary. - The select-men may make a special agreement with him &c. St. Ct. 55.

In bond if she prosecute & fail to pursue it, the select-men may pursue the same prosecution. Ct. St. 55.

If the putative father, after judgment against him, does not find security to maintain the child (if so required) & to save the town harmless & free from charge, he is committed also as a criminal in bond. - The poor prisoners oath is not allowed him. 93.



What y mother has sworn on her examination before y magistrate is good evid. after her death in support of an order of filiation - 5 D.R. 272.

But in Cont. when y county Ct. (she being dead) admitted her deposition, taken before parsons JP's, & also y evid. of y magistrate as to what she testified before him, y judgment was reversed - Qu. how not y evid. of y magistrate being regarded. Hi 289.

Qu. Whether on a prosecution by y select-men, y mother is compellable to testify who y father is? why not? The evid. is not to disclose a crime on her part. wh. do. be otherwise unknown, but to ascertain who was concerned with her in it. Decided by Sup. Ct. & Ct. of errors, but. - y't. she is compellable. 1 Day. 278: 181. 158.

She is not bound by y Com. Law, but by our H. Ct. - In Eng. she is not compellable to testify till after a month from her delivery. 181. 158.

In Comm. y Sup. Ct. reversed y decision of y county Ct. wh. was y't. y mother was not compellable on her own prosecution, to answer questions relative to her intimacy with other men. (1802)

95. Trial of these prosecutions was originally by y Ct. only, & y't. is still y practice.

Depositions are in such cases (in Ct.) admitted as evid. - tho they are inadmissible in cases purely criminal - This is of a mixed character. i.e. partly civil & partly criminal.

But in Ct. y rule as to civil prosecutions, obtains with respect to y right of appeal - There is no appeal from y County court to y Sup. Ct. in criminal cases, so in prosecuting on y's H. This was y old rule - aft. appeals were allowed. But

this is not y case now - they are not allowed now.

## Of the Rights & Duties of Parents in relation to their legitimate Children & vice versa.

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1<sup>st</sup>. The duties of Parents towards such children, consists principally in three particulars. viz. Maintenance, Protection, & Education. 1 Blk. 446.

The duty of maintenance is founded in natural Law, Those who have given life, ought to preserve it, as far as they are able, - 1 Bl. 446. 7. Rayd. 500.

Maintenance consists in providing necessaries. This duty is reciprocal. 1 Bl. 453.

The obligation of Parents to support their infant children is absolute & unconditional, except so far as they may be entitled to assistance from a Parish in Eng., or y Town in Scot. by St. Law. Infants in judgment of Law can't support themselves. 1 Bl. 439. 1 Ves. 163. 1 Bro. Ch. 268. 387.

3 Bay 37. 3 Atk. 392.

This duty is enforced in Eng. by St. 43. Eliz. & in 9<sup>th</sup> Scot. by a similar St. - Scot. H. 232. 232. 1 Bl. 458.

This obligation under these Sts. extended as well to grand Parents as to Parents, & it does not cease with y infancy of y children &c. for by these Sts. all persons who are poor, impotent, & unable (tho want of understanding, age or infirmity) to support themselves, shd. be supported by their parents or Grand Parents if of sufficient ability.

The Law always deems infants unable to support themselves. (not sup.) 1 Bro. 388. 9. Sta. 190.



In Eng. children were under 3 same obligation, But  
now as to 3 Grand children - it seems 3 obligation does  
extend to 3 latter.

The obligation in Town here & Parish in Eng. to support  
paupers, is only secondary, yet if 3 Parents &c. &  
yet if 3 children being primary. Co. L. 545.

99. Grand Parents not liable, if 3 grander has  
Parents, who are able to support him. So the  
grand children are liable, if 3 children are able.

Suppose 3 Parents able, to afford on-  
ly a partial support, are not 3 grand children  
bound to contribute. I think they are. In accor-  
d to spirit of 3 Law. 3 Town not liable, in in-  
stances when there were neither parents nor grand parents,  
of suppt. ability.

100. In Eng. a man not bound to support his  
wife's children, by a former marriage, even dur-  
ing co-testimony, & no question is made as to the  
wife's ability at 3 time of marriage.

The Stat. of 45. Eliz. extending only to natural re-  
lations - i.e. relations of consanguinity. 2 H.R. 1558  
3 H.R. 114, Sta. 140 3 H.R. 11. 180. not relations by affinity. 3 Exp. R.  
1 Sel. 296, 1 Bro. Ch. 208, 1 Kent. 555. Sta. 455.

And maintenance by 3 second consideration for a  
person by 3 children, when they attain full age  
to repay 3 expenses. 4 East 76, 1 Selw. 297.

- The Eng. construction of 3 St. on 3 subject ap-  
pears to me 3 correct one - But yet whether well  
founded or not. construction in relation to 3 particu-  
lar case in question is so? Is not 3 true principle  
this? that 3 husband is bound being of suppt. ability,  
if 3 wife was of ability as he takes her "cum onere".  
secus not, Com. 458. 1458. The St. indeed does  
not as I suppose subject - subject. husb. as extending

to him nor does it immediately affect him at all. But it subjects the mother being of ability, absolutely & upon principle the obligation seems of course to devolve upon him.

12th. 458.

Clearly a man is not bound either in Court, or Eng. to support his wife's parents. The policy of 3 Law forbids it. Stat. 140. 2 Bulst. 245. An. ought not her property to be liable if she was bound?

So one is not bound to support his wife after divorce a mensa et thoro.

Suppose a pauper has parents & children able to support him; - who are liable? Parents or children or both? Is not 7 burden divided in such a case.

But this duty to support children does not oblige any one to disinherit his children by will either here or in Eng. 1 Bul. 355. 50.

As to 7 mode of enforcing this reciprocal duty in Eng. In Court, 7 obligation is enforced w. 7 children & 7 parents of adult children, by application in 7 force of a memorial to 7 county court in 4th. county in wh. 7 pauper lives. 13 Port 60. 240. 168.

An action at C. L. (as aforesaid,) will not lie, for 7 duty is not absolute, but depends upon 7 necessity on one side & 7 ability on 7 other.

But for necessities furnished to minor children an action at Law lies; for 7 duty is absolute. 103.

3 Lay 27. 4 Esp. 22. 1. 251. 13. Johns. 180

In Court, this application w. children & w. parents of adult children may be made by any one of such relations of 7 pauper as are within 7 st. or by 7 select-men of 7 Town in wh. he resides.

On this memorial (sup.) all 7 parties concerned male & female are cited before 7 Ct. & 7 expense of main.



aintenance is apportioned according to their respective abilities to pay, not regarding how much each has received of y family estates. Relations when appointed are required to give security to action for and performance of order. If y security is not given, y bt. issues generally excons. vs. y relations in y name of y memorial.

104. 2<sup>d</sup> The Duty of protecting children, is also founded on natural Law, but it is rather permitted than enjoined by Municipal Law. 1 Bl. 450.

Thus a parent may maintain & uphold a child in law suits with impunity & guilt of maintaining quarrels. 1 Bl. 430.

So a parent may justify a battery in defence of his child - i.e. he may use y same violence wh. y child might. 1 Bl. 450. 2d. Hawk. 82. 2d. Ed. Jac. 276.

A child may maintain & uphold his parents in suits. & may justify a battery in his defence. 1 Bl. 450. 2d. Ed. Jac. 276.

3<sup>d</sup> Parents are bound to give their children a suitable education. This is a natural duty.

There is no provision in y Eng. Law to enforce this duty, except y<sup>t</sup> poor children may be bound apprentices by y overseers & two justices, & parents are forbidden (under penalty) to send children abroad to be educated in y Popish religion. 1 Bl. 425. 450. 1.

In cont. all parents & masters are required to teach children under their care & accordg. to their ability to read y English tongue well, to know y Law & capital offences, & to learn some orthodox catechism, & are subject to a fine for neglect.

106. In cont. select men are authorized to take children from parents neglecting their education, so y<sup>t</sup> they become

nude, stubborn & unruly, & to place them under or to bind them to masters &c. they may be employed, governed & suitably instructed, males till 21. females till 18.

The duties of children to parents consist in their obligations to obey & be subject to them during infancy to support them & to protect them (not sup.) when it is necessary. 1 Bl. 453.4.

### As to the rights & powers of Parents.

The parent has a right to correct his minor children in a reasonable manner. This right is dr. to be founded on a parent's duty. 1 Black. 150. Bl. 452.

By 3 C.L. 3 father had for a time a power over his child's life. 107.

But if a parent exceeds a bounded & moderate & reason, & is influenced by malice, a child may have an action vs. him by prochein ami. But this authority being in a great measure discretionary he is not liable for slightly exceeding limits prescribed by ps. rule, nor for a mere error of judgment, as to a proper degree of correction. It seems there must be unreasonable correction & malice, to subject a parent. 1 Black. 73. 4. Treating 13.

This power of correction may be delegated by a father to a master, the latter is then as to his rights & duties in "loco parentis" 1 Bl. 453. 108.

The consent of a Parent to a marriage of his child under age is also required by Eng. law & ours 1 Bl. 452. without such consent a marriage is void in Eng.

By 4 Cont. Law a marriage is good, but a clergyman or magistrate is punishable by fine.



A father has no power over his infant child's estate otherwise than as trustee or guardian he is liable to account when a child attains full age, or as a case may be before. 1 Bl. 452.3.

109. A minor is entitled to all his property he acquires otherwise than by service - as by gift, grant &c. But a father is entitled to whatever his infant child acquires by service; for he is servant to his father.

1 Bl. 453.

Every parent is entitled to an action "per quod &c." vs. any one who has beaten or otherwise injured his infant child so as to occasion a loss of service - as in case of a servant.

4 Co. 113. 1 Bl. 453. 256. 665.

110. The father is entitled to an action "per quod &c." for enticing away his minor children. Peake's Rep. 233. Tho' if an infant has been beaten or injured he is entitled to damages for immediate personal injury.

Peake's Rep. 233.

And if a parent has incurred any actual expense in consequence of injury done to his child, as in case of a wound, he may recover it. also in his action if specially laid as a ground of damage.

Mo. v. W. 55. Esp. 546.

It is an action lies for a parent vs. any one who has seduced his daughter "per quod &c." a loss of service is a gist of an action. It certainly was original, & is now a nominal ground of action i.e. vt. with. sh. no action lies.

2 Feb. 83.

11 East 22. 2 PR 168. 2 L. R. 572. 19. 055. 2 Decr. 1879. Ray. 259. 3 Wils. 18. #)

111. He decided in Court. by a Jury. Ct. in a suit by Guardian for taking away his ward.

3 Wils. 18. Ray 259.

The expense incurred by a parent during illness may also be recovered if specially laid.

But a loss of service is not a real loss nor the

principal ground of damages. The real ground of damages is the wounded affections of the father & the disgrace occasioned to the family. 3 Wils. 19. Exp. & Dig. 645.

"Evidence" 5. 11 East. 22. 2 Selw. 1087.

For 1<sup>st</sup>. Evidence of slightest service is sufft. 112.

It is not necessary, yet, the damage be in any measure proportioned to the loss of service. 2 T.R. 108.

And Lord Kenyon has lately holden that she need not be proved to have actually served the parent, i.e. actually laboured for him.

It is sufft. if she live in his family as a subordinate member of it - this seems to be correct for she is then deemed his servt. being subject to his commands so that he has a right to her service. Peake's Rep. 55. 237. 1 Root 472.

2<sup>d</sup>. It lies tho' the child, in a pecuniary view, is a burden to the parent & is no profit, as if a nobleman's daughter.

3<sup>d</sup>. The character of the daughter determines in a great measure the quantum of the damages & evd. of her intimacy with other men goes in mitigation. 1 Root 472.

4<sup>th</sup>. Actions of this kind have failed notwithstanding loss of service, where there was no seduction as in case of a prostitute.

It is in England where the father has permitted the daughter to be a married man to visit his daughter. 113.

Bul. ni. ni. 27. Peake's Rep. 239. 40.

But still it has been holden both in the older cases & modern ones that the action lies does not lie unless the daughter is in some way proved to have been a servt. to the parent. 5 Burr. 1879.

Ex. Dir. 722. Bulst. 275. Colles. 127.

La. R. 1022. 2 T.R. 108.

The age of the daughter is not material if she acted 114.



as servt. to her parent when injury was done or lived  
with him as in the above. 2 Lels. 1084. 3 Wils. 18. 2 J.R. 105.

There is one ex. of the age of 30. When is a contract  
of service necessary in such a case, for she is not  
considered as emancipated. 2 East 276. 1 Inst 526.

2 Lels. 1084. 5 J.R. 252.

But if under age she is ~~under~~ servt. to her  
parent of course as I conceive in. she serves another  
or with wages, or receives them herself. 9 Lels. 587.

5 Inst 20. 2 Lels. 1084. It is so. in Esp. 648. yet, daughter  
shd. be resident in her father's house at the  
time of injury done. He cites in his support 9 Burr. 1878.

But in all cases suppose he an infant at a board-  
ing school, or service in another's family for ben-  
efit of parent. The rule is expressed I think too  
generally. If an adult this (or what is tantamount to it)  
as ~~leaving~~ another for father's benefit might be  
suff. to entitle father to action. If adult,  
this may perhaps be necessary, because she shd. not  
be otherwise. a servt. - to say of case.

115. It is so. by Esp. to have been holden by Lord  
Mansfield in 3 Burr. 1878. yet. she must be a mi-  
nor. Else will not hold so nor is Law so.

(Esp. 648.)

The action lies for one also standing "in loco par-  
entis" as an aunt - so for a minister. 11 East 22.  
Paki. 58. In these actions the daughter herself is  
a competent witness, for she is not interested in the  
event. 2 J.R. 4.

An action merely for seducing &c. "per quod &c."  
is substantially an action on the case. 3 Wils. 18.

("Evid. 100.") 1 Rest 372.

116. But in Eng. the action is in form trespass vi et ar-  
mij. 1 Lels. 411. 1 Ld. R. 1117. 2 J.R. 107. 2 N.R. 382.

But yet seems incorrect on principle. tho supported  
by practice & precedent. (5 Inst 384 5 J.R. 261 & 150.)

2 Lels. 1084. 2 J.R. 3. 3 Wils. 18. 3 Burr. 1878. Paki. R. 270. 260.

When  $\gamma$  deft. has illegally entered  $\gamma$  house of  $\gamma$  P'tff.  
he may sue for breaking & entering  $\gamma$  house, & lay  
 $\gamma$  seduction &c. as aggravation i.e. as a ground of  
consequential damages. 1d. R. 1032. 2 T.R. 167.8. 2 Wils. 312.

5 Wils. 20. 1 H.B. 555. Fulk. 206. 5 T.R. 292.

Here  $\gamma$  action is both in substance & form trespass.  
 $\gamma$  gist of it being  $\gamma$  unlawful breaking of  $\gamma$  house.

Here  $\gamma$  form is doubtless right on principle.

2 T.R. 166.

But if trespass "vi et armis" is not, a license to 117.  
enter  $\gamma$  house defeats it. Entering  $\gamma$  house being  
ground of action, &  $\gamma$  not only aggravation. 2 T.R. 166.

In Engd. it must be pleaded, being a just-  
ification. Not so in Cont. under  $\gamma$  H. of pleas-  
ings.

According to some a license is no defence, as  $\gamma$  sub-  
seqt. wrong makes deft. a trespasser "ab initio".  
This opinion is clearly incorrect,  $\gamma$  license not  
being given by Law. If it were given by Law  
 $\gamma$  rule wd. be right as in  $\gamma$  case of taking a  
distress, entering a tavern &c.

Ques. Will an action lie for taking away one's child  
without alluding a loss of service, or other spec-  
ial damages? as special damages, trespass &c.  
felix raptus &c. By some opinions it will, as a  
parent has an interest in  $\gamma$  education of his  
child -- sed qu. for  $\gamma$  opinions are contradictory  
except  $\gamma$  child is heir at Law to  $\gamma$  P'tff. in  
wh. case  $\gamma$  father by  $\gamma$  feudal law is entitled  
to  $\gamma$  value of  $\gamma$  heir's marriage, wh. he might  
lose by  $\gamma$  abduction. 5 Bl. 140. Bro. E. 770. 5 Co. 48. b.

2 Bur. 1879. 1880. Fulk. 90. 260

Here indeed all  $\gamma$  children were heirs apparent, but  
 $\gamma$  feudal reason never existed here.

The authority of  $\gamma$  Parent ceases when  $\gamma$  child at-



Turns of age of 21 - 1<sup>st</sup> born. 153. He is then said to be emancipated, i.e. he has a right to exemption from parental control. But he may continue a Servant "de facto" without any contract for that purpose, as is often the case. & while he so continues there is no actual emancipation. Post. 150.

East 176.

5 P. 22. 152. East 176.

The mother as such has no authority over the father's life, when she corrects, she is supposed to do it with the father's consent I suppose.

How far a Parent is made liable for acts of his Children.

1<sup>st</sup> He is liable for their torts (they being minors & under his care) to the same extent to which a master is liable for the torts of his Servant. He is liable as master.

(see Master's Servant.)

119. 2<sup>d</sup> He is no otherwise liable on their contracts than as masters are on those of their Servants, except in the case of contracts for necessaries, where a parent must furnish them.

3<sup>d</sup> By Court. It is certain cases a parent is obliged to pay fines inflicted on his inf. children. Ex. case of sabbath breaking, omitting to work on highways, & for neglecting military duty.

Remark. There is generally a mistaken idea as to Parent's liability for his children - he is not liable for his child's breaking neighbour's window as supposed generally - but only when he is liable for the same act committed by a Servant.

Finis "Parent & Child."

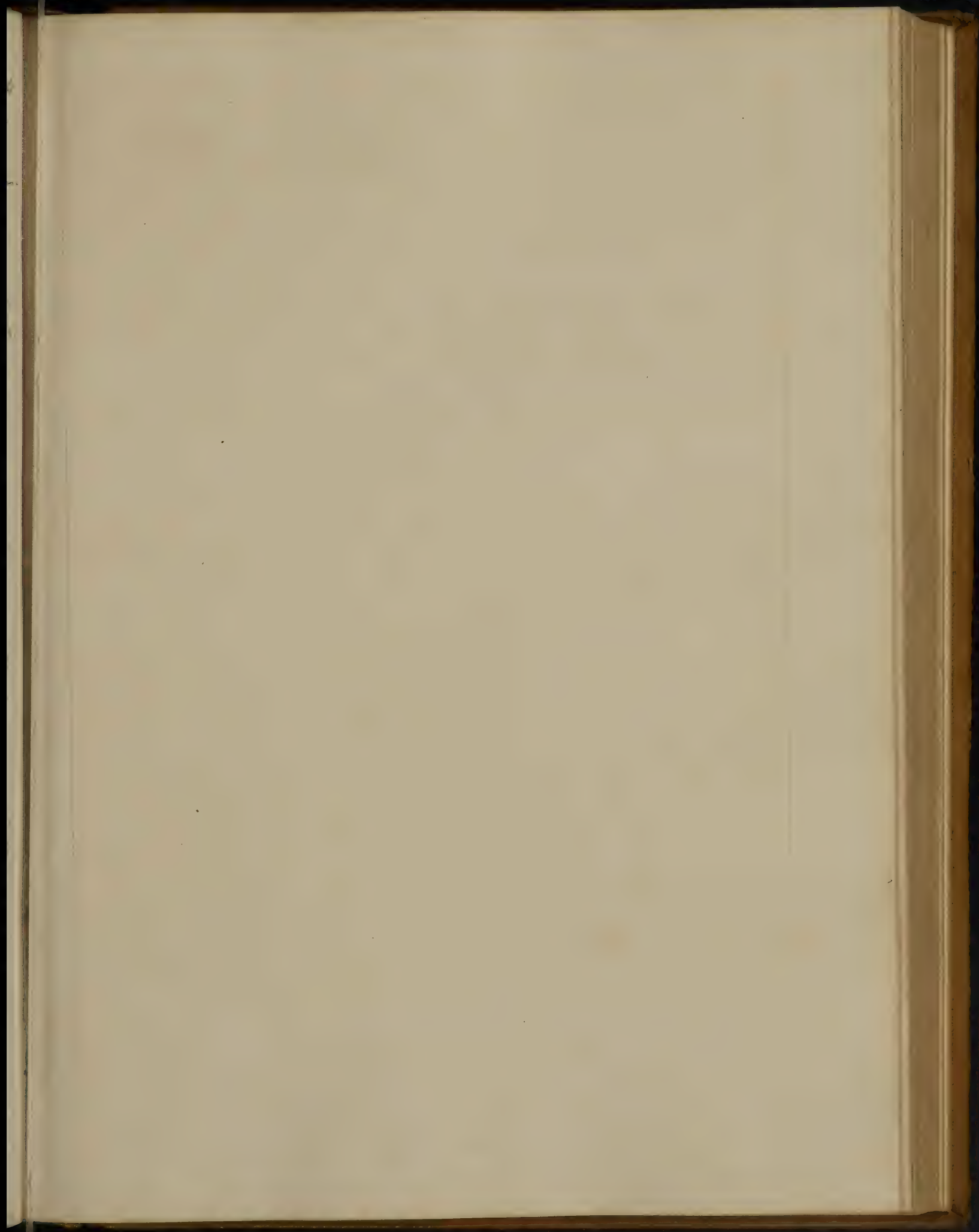
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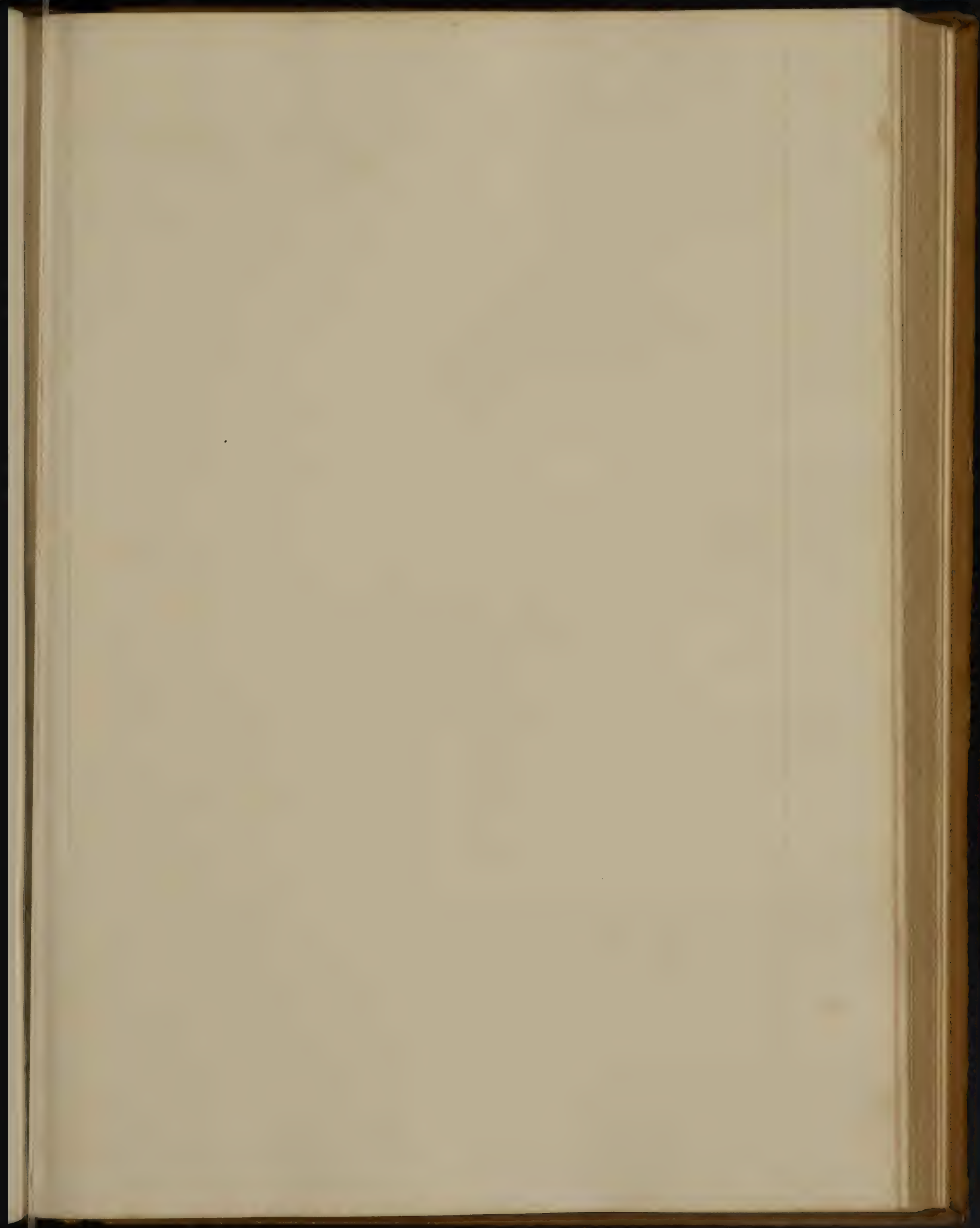
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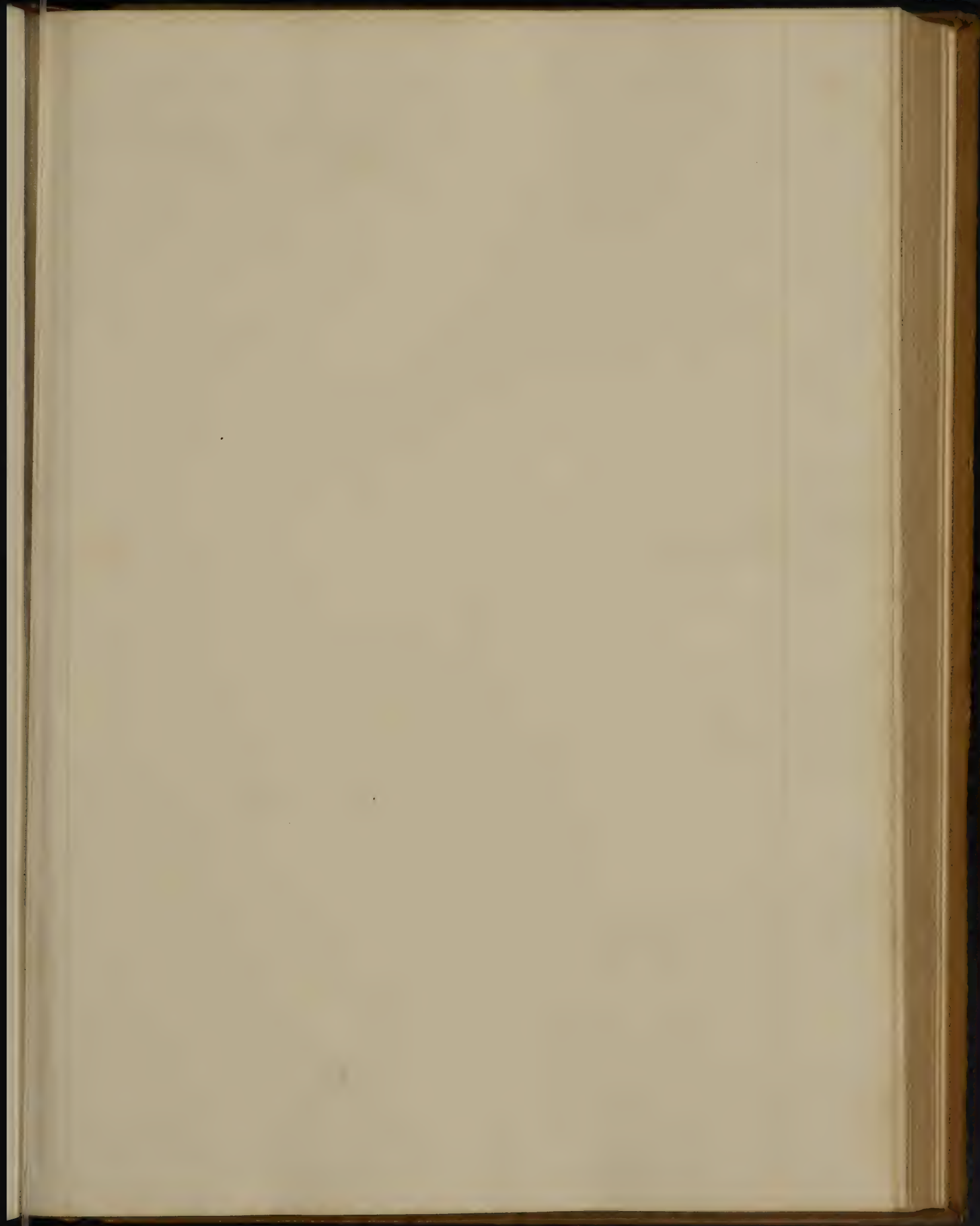




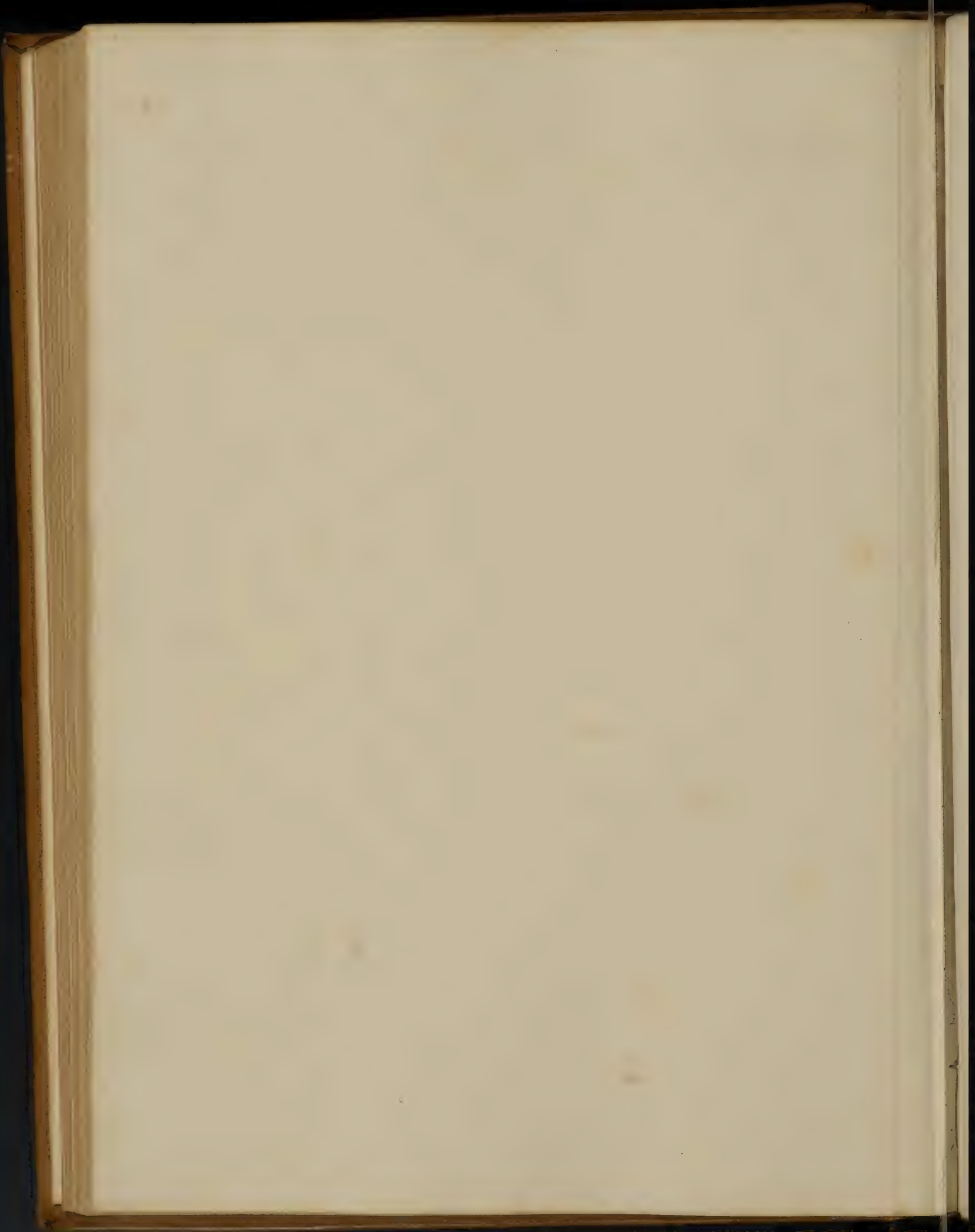


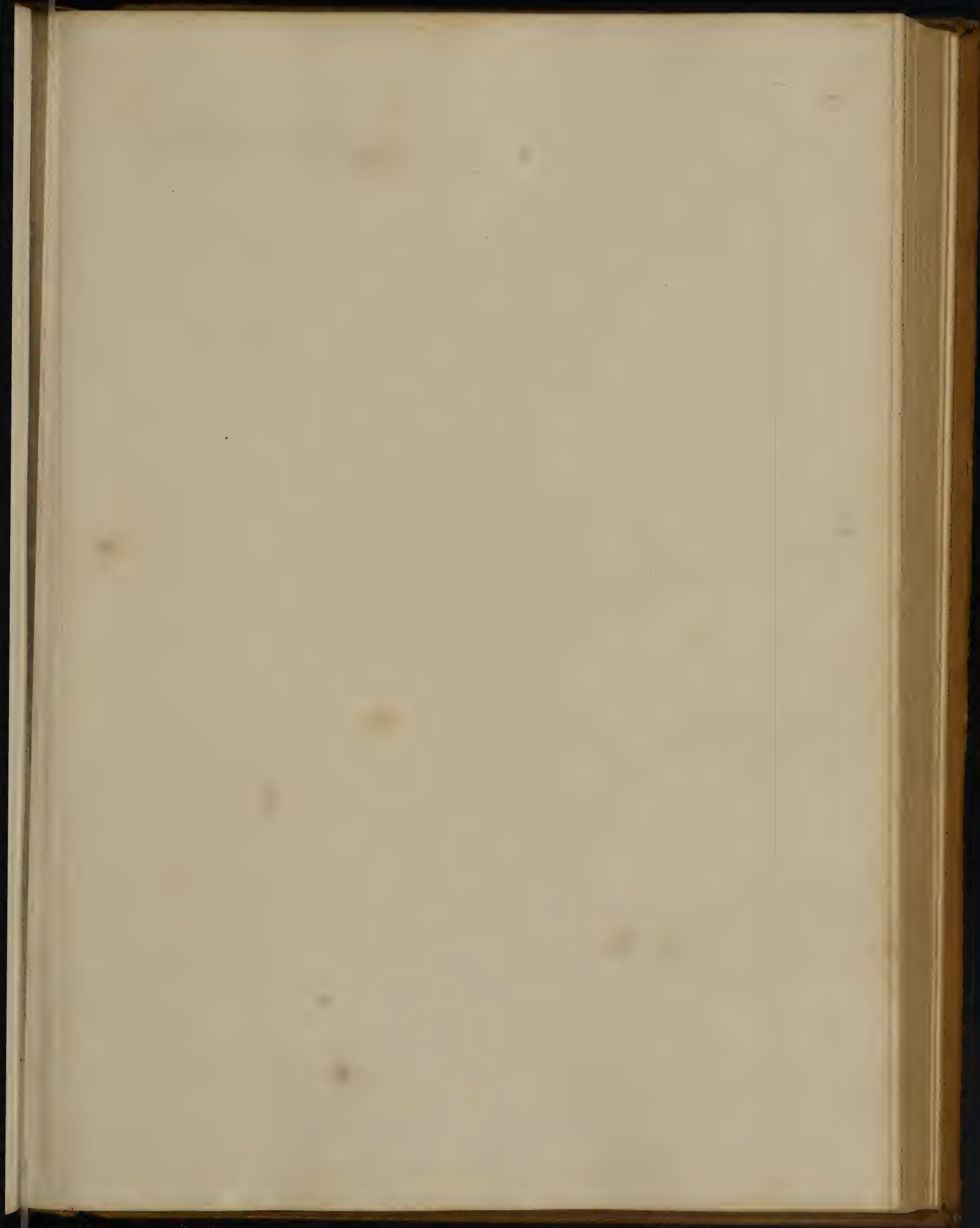




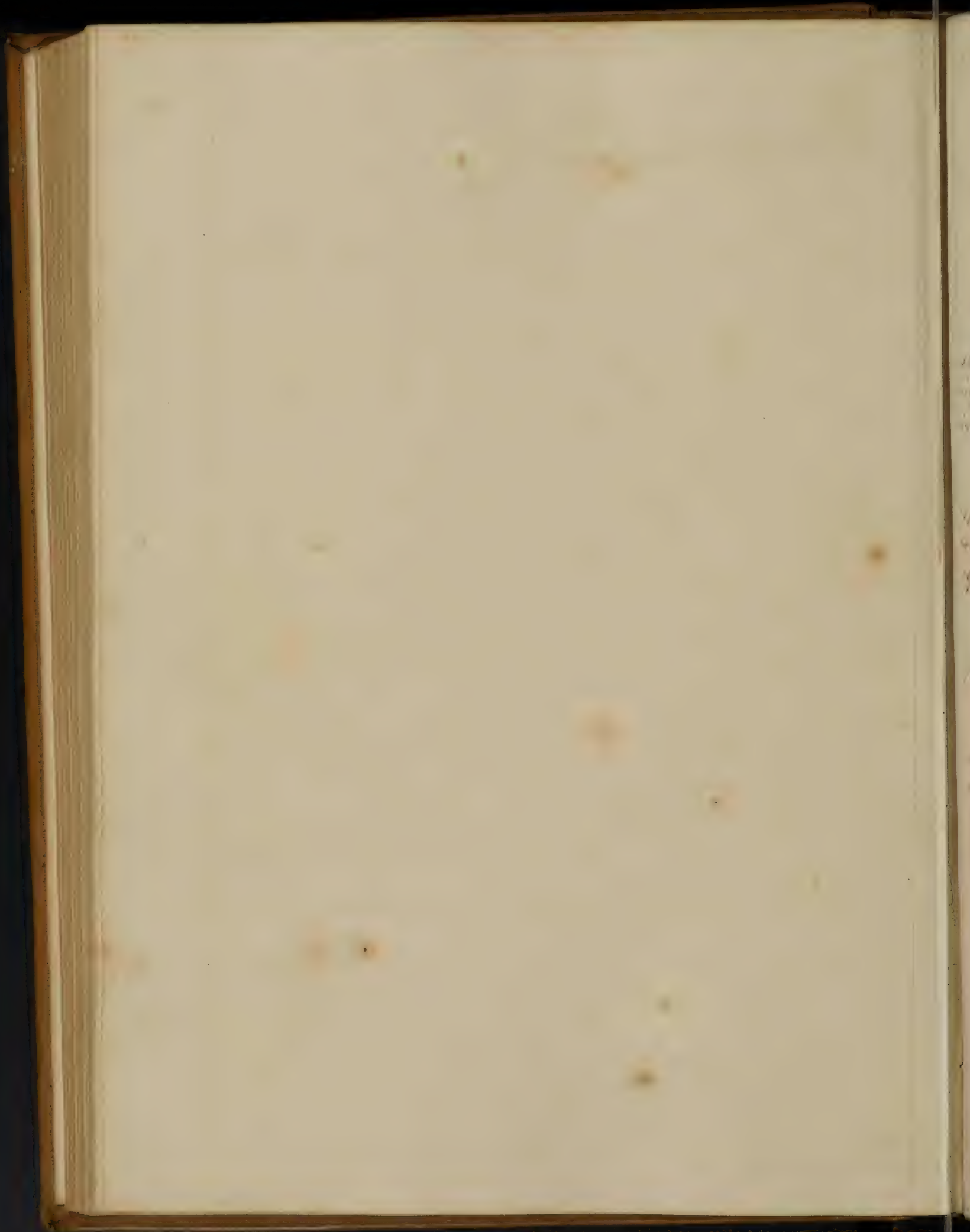












## Guardian & Ward.

Of the Diff. kinds of Guardians, & their Rights  
& Duties.

120.

A Guardian is a temporary Parent i.e. a person "in loco parentis" for certain purposes, owing to child's minority. A child, under a Guardian, is called a Ward. 13th. 460.

The Eng. & Guardian has charge of Person & estate of Wards, i.e. Both are under care of some Guardian. But estate may be under care of one Guardian, & Person, under yt. of another.

They are distinct offices under Roman Law, & persons exercising them, were called Tutor & Curator.

The Law of Guardianship, if I am not mistaken, is less understood, than any portion of Law - & it is difficult to be understood. I explain diff. kinds, not because they have obtained in our country, but because it is important to understand them.

First. The diff. kinds at Com. L. are four.

121.

1. Guardian in Chivalry. This obtains only when an estate holden by knight service, is vested in an infant by descent. It continued over males till full age, & over females till 10, or marriage.

It extended to person & lands within Guardian's Seignory. The Guardian was not accountable for profits. It was abolished with Military Tenure in Eng. at Restoration in 1688. 12 Car. 2d. Co. L. 88. n. 11. 2 Blk. 234.

2. 33th. 67. v.



It is not known in y Conn. Law, nor in y Law of any  
of y U. S.

III. Guardian by nature. Some books mention 2  
kinds of guardianship, as if it was confined to the  
Father, some as if confined to parents. 1 Ed. 651.  
5 Co. 22. B. 5 Co. 25. a.

Father, & Mother, or any other of Ancestors, may  
be Guardian by nature at C. L. The Father's  
claim excludes all others. The Mother is the  
second &c. & among more distant Ancestors, if  
two have an equal claim as if y infant is  
half apparent to his paternal or maternal  
(Grandfather) priority in y person of his person,  
seems to decide y preference. 5 Co. 28. a.

Co. Lit. 86. b. n. 12.

It extends only to y heir apparent of y ances-  
tor & not to other children. I suppose whether in  
Eng. a daughter can be y subject of it, as she can  
be but heir presumptive. Co. Lit. 88. n. 12.

This kind of Guardianship extends only to the per-  
son & not to y estate, & continues until y ward is  
Co. Lit. 88. Co. Lit. 88. a.

In Conn. all one's children were heirs apparent,  
& y trust extends to both y person & y estate.

128. The Eng. y Father may suspend y claim of all y an-  
cestors, by appointing a Testamentary Guardian,  
by H. 12 Con. 2.

When y Father was natural Guardian, y person  
of y Ward belonged to him, in exclusion of the  
rights of y Guardian in Chivalry. seems when  
any other ancestor was natural Guardian.

In Eng. & Parents are styled natural Guardians of all their children. By yt. is meant not yt. they are Natural Guardians at C. L. but such as Law & Nature designates as proper Guardians & when there is none provided by positive Law, & Chancell. or in his discretion settles & Guardianship on & Father & at his death on & Mother.

III. Guardian in Locage. This species springs (like yt. in Chivalry) from nature, & takes place only, when an infant under 14 is seized of lands, derived by descent & holden by socage tenure. 124.

2. Mod. 176. 131. 451. 2.

Co. L. 87. 438 n. 15.

It belongs to & nearest of & Parents kindred, to whom, & land can't possibly descend, yt. there may be no temptation to an abuse of Trust. 131. 451. 2.

Among claimants there is no distinction between & whole & & half blood. If two or more kindred (claimants) are in equal degrees, & priority proper decides between them, except yt. among brothers & sisters (half blood supposed) & eldest is preferred - & among & lineal ancestors, males are preferred. Co. L. 87. 438 n. 15. 1 Mod. 40. Fenton 17.

The Guardian in Locage may lease & lands Estate till he is 14. & may maintain Ejectment in his own name. Stat. sec. 123.

131. 451. 2.

Guardianship in Locage extends to & Person, Socage Estates, to incorporeal hereditaments & (it seems) to personal property. The custody of & Person drawing after it, every species of property. Co. L. 87. n. 15.

The Trust is not assignable, like yt. in Chivalry.



for it is for the infant's benefit. That of Chivalry is not for the ward's benefit.

At 14 the ward may enter & oust the Guardian & occupy the land. The Guardian is accountable for the profits & is allowed his reasonable expenses.

inst. 5 sup.

At 14 the Infant may choose a Guardian.

Guardians in Socage, may be superseded by appointment of a Testamentary Guardian.

Co. L. 89. m. 2.

These diff. kinds of Guardians have been established, yet all kinds of children might have Guardians - i.e. children under diff. circumstances, & are qualifications to the diff. kinds of Guardianship.

IV. Guardianship for Protection. This takes place only where there is no other Guardian; It extends to children who are not heirs apparent, but to their persons only, & terminates at the age of 14.

Co. L. 89. m. 2. Co. L. 89. m. 2. 136. 551.

It is exercisable only by the father or mother, but 24th. 14. Can it ever take place as to heirs apparent? It seems not, for if ever there is a parent, he or she is natural Guardian in this case till 21.

27. After 14, if there is no Guardian in Chivalry, & there being none in Socage, who is Guardian of the younger children? I suppose one appointed by the King, or chosen by the Inf.

These three last species of Guardianship may be superseded by appointment of a Testamentary Guardian. Guardianship in Chivalry was abolished by the same st. yet established Testamentary Guardianship.

Qu. Can there be a Guardian for nurture in Conn.?

Second. By 7 H. 12 Car. 2. a father, whether himself of age or not, may by will or deed, with two witnesses appoint a Guardian for any or for all of his children, who are infts. and unmarried, & even to infts in "ventre sa mere". The appointment, may be either in possession or remainder. It may continue even till 21. or terminate before yt. age. This Guardianship extends to y person & all y estate. It supersedes all others.

2 Hils. 129. Co. Lit. 89. n. 15. 1936. 462.

10<sup>th</sup> H. 705. 2<sup>do</sup>. 110.

A Testamentary Guardianship is not assignable; For y Trust is fiduciary - one may decline but can't assign. As to Guardians by H. 4. 8. 5. Ph. & M. for females under 16. see 3 Co. 59. a.

Co. Lit. 89. n. 11.

3 Co. 59. a.

Third. As to Guardians by custom. see Co. L. 89. n. 11.

Fourth. Guardianships not enumerated by the old C. L. writers - & yt. are now known to y Eng. law as it is, are. 1<sup>st</sup> By Election of y Inft. - a kind not known to y ancient C. L. but obtains in y country. This takes place only when there is no other appointed either by y law, or by y appointment of y father. Ex. no lands helden by knight service, nor by socage tenure, or if any y inf. being won 14 nor for nurture. he being abt y age of 14. not heir apparent, so no Natural Guardian & finally no Testamentary guardian.

Co. L. 89. n. 89. n. 16.

This kind of Guardianship is of late origin however it has been in use ever since y restoration (1660) & it seems before,

The election is so frequently to be made before a Judge or a circuit.

In Eng. there is no particular form of electing a Guardian. Ld. Baltimore when 18 named his Guardian.



dian by deed. Qu. Is a parent election good?  
I think the Chancellor has power to agree or dis-  
agree to the infant's choice - for I do not think  
the law so inconsistent as to allow the infant to ap-  
point one absolutely. 1 Ves. 375.

Co. L. 87.9. n. 16.

The age for choosing is said to be 14. in Eng. yet it  
is also said a choice may be either before or after  
that time.

Indeed it is so yet before restoration. - Can. 2, of  
practice of choosing guardians was almost con-  
fined to infants under 14. The C. L. deeming a guar-  
dian to be of age in a great measure unnecessary.

Co. L. 89. n. 10. 12 Bl. 1. 170.

2<sup>d</sup>. Guardian by appointment of the Chancellor. This  
species is also of modern date it seems.

But the C. L. of Eng. has exercised the power of ap-  
pointment ever since the year 1095 with opposition.

Gib. 9. Rep. 172. 13 Bl. 1. 170. 574.

The Chancellor never exercised this power however  
when the infant is otherwise provided with a proper guar-  
dian. When he is not thus provided for, the power  
of the C. L. is very extensive. Its authority is in a  
great measure discretionary & extends as well  
as to the appointment of Guardians.

1 Ves. 160. 12 Bl. 1. 170. 13 Bl. 1. 170. Co. L. 89. n. 16.

Pr. in Ch. 106. Co. R. 180. 1296.

The Chancellor may remove even a testamentary  
Guardian.

The Chancellor may appoint a temporary Guar.

dian, may compel any Guardian to give security, & may make his discretionary orders absolute as to support of y. inf. or as to his estate. But Chy. has no such authority in Com. but in neighbouring states, where there are distinct Cts. of Chy. it may exist, as to this see. 203 ac. 679. (ib. ante.)

3<sup>d</sup> Guardian by appointment of y. ecclesiastical Ct. The law as to the power of this Ct. to appoint is not generally settled. It claims y. right of appointing for y. personal estate, & y. person also, there being no other. This right & power was always denied.

1044 131. 533 m. 1496. 5 Kibb. 384. 2 Lec. 162. b. L. 131. b. 132 a. 86.

This right has lately been denied as to y. personal estate of y. inf. & holden y. such Ct. can appoint "ad litem" only. 133.

4<sup>th</sup> A Guardian, ad litem is a special Guardian appointed for a particular suit, when an inf. being seft. has no Guardian. He may be appointed in any Ct. in wh. an inf. is seft.

2 Lec. 136. 5 Co. 50. 836. 427.

Co. Int. 89. 16135.

The King may appoint a Guardian "ad litem" by letters patent, but y. practice has been long out of use.

Co. L. 89. 16.

Fitzh. 27.

In Com. a Guardian ad litem is never appointed for an inf. J. H. 133.

In Eng. can children having no C. L. Guardian elect one at 14, when guardianship for nurture ceases? or how are they provided for at C. L.

The Father I suppose continues natural Guardian of them all according to y. import of y. term in Eq. & y. Chancery settles y. Guardianship upon him when necessary.

Also indeed y. H. 12 has given y. Guardianship



in such cases to y Father.

135. Under y Comt. Law there is no Guardian in Chivalry, in Socage, by Testament by custom, by appointment of Chy. or Ecclesiastical Ct.

The Guardians known to Comt. Law (I suppose) are

1. What they call Natural Guardians.

2. By appointment of Probate.

3. Ad litem.

Guardianships for nurture can't I think exist in Comt. For y Father is natural Guardian to all his children & y mother is as much Guardian to all as to any - indeed all are heirs apparent.

Natural Guardianship of y Father continues in Comt. till they attain 21 & extends as well to their property as to persons.

136.

On y Father's death, y mother usually acts as Guardian, but another may be appointed for y male children, during her life, as a matter of course, without formally displacing her. When it shall so happen y<sup>t</sup>. there shall be any minor who hath neither Father Guardian, nor master &c. says Comt. St. 273. no mention being made of y Mother. But even in y<sup>s</sup>. case y Inf<sup>t</sup>. genly. lives with y Mother, but it appears she is not Guardian "de jure".

It is holden of y mother y father being dead) is y Natural Guardian, to her female children, till they attain y age for choosing. By what law is this distinction created between males & females?

But in Comt. (living y father) another Guardian can't be appointed, uny y former is removed & this can be done only for special reasons, & not of course.

How far father's rights are affected by appointment of a Guardian. *vid. Cont. St. "Guardian."* 127.

The mother, then, does not, by Cont. law, seem to be of course or of right, Guardian to her male children. (Is a Guardian any more of female than of male!) For if whatever ages they may be, another may be appointed if course - tho she is frequently a Person appointed, & father being dead.

In law. if an inf. boy, no father, guardian, or mother, it is a duty of a Ct. of Probate to appoint one. If a inf. is of an age of choosing (12 or 14) a Ct. is to summon him to appear & make his election. But his choice, tho to be regarded does not control a Ct. who may appoint a diff. person. *Cont. St. 378.*

If he don't choose, a Ct. appoints one according to its discretion. 128.

If a male inf. (not so with females) is under age of choosing & has no father, a Ct. of Probate may appoint with summoning a inf. to attend he can't choose. But as isn't really gone, (mother living) an application is made to a Ct. for a Ct. purpose.

The Ct. of Probate may, in place, rather in such case, as they may in E. G.

It seems a Ct. may appoint, as after an occasion requires. The 8. paragraph enables the Ct. to appoint when father is dead.

*Cont. St. 273. 2 Root 323.*

In Cont. it has been resolved, yet a ward has a right to live with his Guardian, & can't be removed by a Court. 129.



But, if he become chargeable, for he must be settled.  
Post. 154.

159. In Court, it has been resolved, yt. a ward has a right to see his estate.

Removal of the rule relating to settlements, acquired by a person, yt. one might be removed without being chargeable, & rule is then correct. But in case of his being actually chargeable with a town concerned have an interest in removing him. & the removal would seem to be a sort of a sort of Court. law, & really an invasion of town rights.

In Court, a Guardian appointed to an inf. under a age of choosing, continues of course till 21. and if inf. choose another to his acceptance of the Ct.

Lib. 282. 86.

Court. law requires a Ct. of Probate to take security of all Guardians appointed for them for faithful discharge of their duty, to oblige them to account with the Ct. a ward when he attains full age, or sooner if the Ct. on complaint, shall require it. The bond must be "with security" if he has estate.

But in Court, a Guardian thus appointed is not liable to be sued, to account by the ward (while a minor) nor called upon by the Judge of the Ct. of Probate to account. 1 Root 51. 2.

By the King. law also, all Guardians (except in Chivalry) are compellable to account for the ward's property in their hands.

And yt. species of Guardianship being now abolished, this rule extends to every Guardian of his property.  
2 Co. Lit. 89. 09.

The usual remedy in Eng<sup>d</sup> is by Bill in Chy. this proceeding being more extensively remedial, than an action of account at Law in compelling a disclosure under oath, production of papers &c. tho' an action of account will also lie. Co. Lit. 88.9.10.

1 Bl. 403. 2 Bac. 677. 87.

In Eng. it is not uncommon for Chy. to compel a Guardian to account annually, especially if the estate be large. 1 Bl. 463.

In Cont. the usual remedy is by action of account, wh. is nearly as remedial in the state, as a Bill in Eng. in Eng<sup>d</sup>. In a Guardian is bound to produce papers &c. & to disclose.

If a ward's estate is in danger from a Guardian's insufficiency, & latter, tho' his parent, may be compelled to account at any time. 2 Mod. 177.

1 Eq. Cas. 137. 260.

In case of misconduct by a Guardian, Chy. in Eng. may remove him; so if there is reasonable ground to apprehend misconduct, & Ct. may order him to procure security, & on refusal displace him.

Indeed the Chancellor in such cases acts discretionally & makes such orders as he thinks proper. 1 Eq. cas. 261. 2 P. W. 703. 6. 2 Mod. 177.

1 Bl. 463. 1 Talk. 44. Term. 452.

1 Rep. 160.

All Guardians except parents, are bound at their own expense to maintain their wards; but may apply to the ward's estate. But a parent when Guardian, is obliged to support his ward, & if his of ability Chy. will not allow him to apply any of the ward's estate to his education & maintenance.

1 Br. Ch. 287. 1, 412. 379.

1 Term. 256

Secus if not of ability. He may then by leave



If a Chancellor apply for ward's estate, but it must  
be a case of clear necessity, to warrant such per-  
mission of a Chancellor. *Toll. m. l. 328*

*1 Ves. 150*

But a widow having married again, is not bound  
to support her children by a former marriage  
but she may apply for estate. Otherwise, her  
second husband. will be virtually burthened with their sup-  
port, she is a feme covert. & has no property.

\*

*2 P. W. 11 3 J. & K. 60. 399.*

*15 Rep. 122 5 Rep. 755. 3 Bro. Ch. 60. 40. 225.*

It may also be. It is for any more than ordinary &  
necessary expense in maintaining a child, a par-  
ent may apply for child's estate, if the object is for  
the child's benefit. & the expense reasonable. Ex-  
money advanced for child's apprenticeship to a  
useful trade. *2 Vent. 383. 2 Vern. 137. 255. 1 Ves. 160. n. 1.*

*13 R. Ch. 268.*

The last rule has been denied by Lord Hardwick  
in a case of apprenticeship, clerkship &c.

Under permission of a Chancellor, he may apply  
a part to the child's education, is I think Lord Hard-  
wick's denial subject to the qualification.

*1 Ves. 100 3 Bunbury 136 3 Atk. 399.*

Qu. Must not every case of the kind stand on its  
own bottom or circumstances? The Chancellor gives  
permission or not in his discretion.

In Court. when interest of an infant mortgagee  
is decreed to be reconveyed on a bill for redemption,  
the Guardian is empowered by the Court to make a  
reconveyance, & may be enjoined to do it, under a  
penalty, & if the infant has no general Guardian, a Guardian  
"ad litem" appointed by the Court, is authorized  
to reconvey.

*See Court. Guardian.*

By Court. law a Guardian of infant heirs is decreed

Joint Tenant, or Tenant in com., is empowered, with 3 appraisance of such persons as 3 Ct. of Probate shall appoint, to make partition of 3 land.

In Eng. & Guadalupean or "prochein ami" (it is said) may  
bind & unite by equal partition.

What y inft. may do it, see ante.

395. n. 1801. 2 Bacc, 684.

2 Koll. 256

If 3 wards creditors in a compromise, accepts from  
4 Guardian, less you is one, 3 ward & not 3  
Guardian has 3 benefit if 3 discount.

2-64. cons. 255. 2 Dec. 6'87.

The Guardian is considered in Chy. as trustee  
to y word, & if a stranger tortiously enters upon  
y Infants land & takes y profits, he is compel-  
lable in Chy. to account as trustee or Guardian;  
or he is liable as a "trespasser" at y election of  
y inst. But this can happen only in case of  
insts.

2 Barn. 295, 342, 1 Phill. 561, 1, 4. n. 404.

Exp. ca. 280, Y. 436.

The Guardian must allow interest, for ward's money in his hands, and he shows y<sup>t</sup>. interest ed. not be obtained for it.

1 1/2, cont. 180

282p. 625.

22200. 687.

It is a duty of a Guardian having personal prop-  
erty of a ward, to pay debts charged on a ward's  
estate, out of his property, & not with his own.  
This rule is to prevent interest from accruing  
on a debt vs a ward.

162. exp. 156.7.

And if y ward's estate is in mortgage, y Guardian ought to apply y profits of y estate to y interest, & if it will, more than do this, y remainder to y discharge of y principle. ~ D. 11. 479.

25. 11. 279.

The Guardian has no power to vest or ward's money



in lands. But if he does it, taking a deed in  $\gamma$  ward's name,  $\gamma$  latter may at full age, take in either at his election, tho- if he take  $\gamma$  money, he is compelled in Chy. to recover  $\gamma$  land of  $\gamma$  Guardian.  
1 Vern. 435.8

But if in such case  $\gamma$  ward dies, without making his election, his execrs shall have  $\gamma$  money, for  $\gamma$  right of election being personal, his heirs can't claim  $\gamma$  land.  
1 Vern. 435.855.

An genl  $\gamma$  Guardian, in accounting for  $\gamma$  ward's money, is obliged to pay only principal & interest, But if  $\gamma$  money was directed to be appropriated in a particular way (as in  $\gamma$  funds) &  $\gamma$  Guardian has appropriated it in another, as in a gainful trade,  $\gamma$  ward may have at his election  $\gamma$  interest or  $\gamma$  profits.  
2 Ves. 629.

As to  $\gamma$  marriage of wards,  $\gamma$  Chancellor in Eng. exercises an authority never claimed by any of our Cts. He forbids marriage without consent of  $\gamma$  Guardian, & even if  $\gamma$  Guardian does consent to an unequal marriage, at his discretion & punishes as for contempt, those who assist in  $\gamma$  marriage after  $\gamma$  prohibition.

This does not (I. G. concludes), regard wards under  $\gamma$  Guardianship of Parents  
Bull. 58. 2 D. R. III. 562  
1 Tex. 160.

So if there is only an apprehension of  $\gamma$  ward's being married to his disparagement, tho- with Guardian's consent,  $\gamma$  Chancellor will prohibit it & secure  $\gamma$  person of  $\gamma$  ward if necessary, & can enjoin  $\gamma$  Guardian &  $\gamma$  other party not to permit it.  
34th. Feb. 2 D. R. III. 112.  
Bull. 58

Is y<sup>s</sup>. authority even exercised when either of y<sup>e</sup> Parents is Guardian?

In Cont. according to usage, Guardians may bind wards as apprentices.

The Guardians power over his female ward, is sd. to be determined by her marriage. 1 Rep. 91. 160.

Qu. Ifs to her propy, viz he (y<sup>e</sup> husb. I suppose) is of full age, in wh. case, he becomes virtually her Guardian.

Not so of y<sup>e</sup> Males, i.e. quoad their propy y<sup>e</sup> Guardianship continues.

## Settlement of Strangers.

For y<sup>e</sup> Cont. law, respecting y<sup>e</sup> acquisition of original settlements by persons in their own right, see Cont. St.

1<sup>st</sup>. Under Cont. St. no foreigner, i.e. no person, not an inhabitant of y<sup>s</sup>. or any of y<sup>e</sup> M. I. can gain a settlmt. in any town in this State, viz admitted by y<sup>e</sup> vote of y<sup>e</sup> town or by y<sup>e</sup> consent of y<sup>e</sup> civil authorities & select men, or viz he is appointed to, & executes some public office.

Scrup, he may be warned to depart under penalties described by y<sup>e</sup> St.

2<sup>d</sup>. & 3<sup>d</sup>. inhabitant of any other of y<sup>e</sup> M. I. can gain one, viz he has one of y<sup>e</sup> above qualifications, or viz possessed, in his own right in fee, within y<sup>e</sup> state, & during his continuance &c. of Real estate, of y<sup>e</sup> value of \$334, & shall have owned y<sup>e</sup> estate, & resided in y<sup>e</sup> town at least one yr. before &c. scrup he may be warned as above, or transported into his own state.



3<sup>d</sup> 9<sup>th</sup> infl. of one town in yr. state, can gain a settlement in another, if he has some one of y qualifications first mentioned, or if he has in his own right in fee, real estate, of y value of £100 in y town &c. or if he has supported himself there 6 yrs. (under y old law before 1792. y period was 1 yr.) & paid all his taxes. But within y<sup>t</sup>. period he can't be removed, if he has become chargeable to y town.

Other Modes of acquiring settlement are  
1. 1<sup>st</sup> C. L. By Birth. The place where a child is first known to be, is prima facie, y place of its settlement. i.e. deemed to be y place, till another is shown to be.  
Comb. 364. 1 Blk. 362, Coats. 433.  
Salk. 485. 1 Ed. 42567.

This is genly. y place of a bastard's settlement, in Eng.  
1 Blk. 362. 3. 459.  
Salk. 427.

And in all cases of bastard children, if neither father nor mother has a settlement in y Realm or county, y child is settled in y place where it is born.  
1 La. R. 517. 1 Blk. 362. 1. Coats. 433. Comb. 364.

But in y case of legitimate children & (under Com. L.) illegitimate also, y presumption may be rebutted.

The rule is y same in certain cases as to illegitimate children in Eng.  
1 Blk. 362.

2. Settlement may be acquired by parentage, The settlement of y father or maintaining parent owing y<sup>t</sup>. to y child.  
1 La. R. 114. Salk. 328.

Brown's descent cas. 2712. La. R. 1473.

1 Blk. 302. 5 July. 189. 5 Blk. 600.

This last rule holds in Eng. genly. as to legitimate children only.

But in Cont. Bastards are settled with y mother & not with y putative father. 19 Inst. 155.

Settlements acquired by parentage are called derivative.

The settlement of legitimate infant children (not emancipated) regularly follows yt. of y parent. If y latter acquire a new one, it is immediately communicated to his inf. children.

(\*)

) After y Father's death, it regularly follows y moth - 154.  
ex. (5 Inst. 1. \* 2 J.R. 114, 116, 880, 159, 980, 118.)

Secus. in Eng. when a widow having children, marries a second husb. for he is not bound to support them, tho' if under 7 they go with her for nurture.

(Dover set. cas. 49, 64, 217, 638, \* 37.)

22 H. 1593, 1595. 2 Inst. 370, 528, 3 Inst. 109, 409, 9. n. \* Stra. 558, 831.)

The usage in Cont. is sd. to be otherwise. sed qu. ante  
"Hautbois vs. Holsman". n. 11. 220, 1814. 10 Inst. 151, 2.

In Cont. a ward gains no settlement by living with his guardian, appointed by probate, tho' he has a right to live with him.

By acquisition to a new settlement, y old one is lost, but in no other way, i.e. one can't actually hold two settlements at y same time, tho' he may have y necessary qualifications in two or more towns or parishes. Ex. a freehold in two towns & may reside in either  
Dover set. cas. 270. 2 Inst. 528, 9.  
1 Bk. 568.

An inf. may under some circumstances, gain a settlement of his own by comorancy & then his derivative settlement is lost. Ex. an inf. apprentice in Eng.

If y gaining a settlement works his emancipation i.e. he is no longer a serot. to his father & may take his emancipation if he pleases, & he must be sup-



ported by y new settlement, as he is severed from  
y old one.

Id. R. 567. 1 W. 367.

3 D. R. 110. 355.

Q<sup>n</sup> cont. an apprentice does not gain a settlement  
by ~~living~~ with his master.

1 Root. 151. 2.

After a child is emancipated  
i.e. after he ceases to be considered in law as belong-  
ing in y character of servt. in y parents fam-  
ily, or being under his care & government, he  
can't take y benefit of a new settlement. acquires  
by y father, & y wife holds, even tho he contin-  
ues to live with y father.

3 D. R. 110. 355. 8 D. 479.

Bar. int. cas. 170. 635. 886. 11 W. 185. 190. 583. 1 East. 520.

156. Emancipation if an infant may be effected.

1<sup>st</sup>. By full age.

3 D. R. 355. 1 W. 185.

Bar. set. cas. 270.

2<sup>d</sup>. By marriage.

3 D. R. 583. 50116. Str. 438. 851.

1 East 516. Bar. set. cas. 270.

He is exempt only as to his person & not as to his prop.

3<sup>d</sup>. By gaining a settlement of his own, as  
apprentice.

3 D. R. 356.

4<sup>th</sup>. By contracting any relation, inconsistent with  
his remaining under y care & government of his par-  
ent (as y<sup>t</sup>. of a soldier) long enough to sever  
him from y father's family.

3 D. R. 479. 690. 247.

Bar. set. cas. 635.

1. But attaining full age is not an emancipation, if  
y party continue a member of y parents family  
i.e. continues as a servt. under y domestic gov-  
ernment of y parent. But suppose he boards  
as a guest with y father. In y<sup>s</sup>. case, I think,  
he wd. be considered as emancipated.

3 D. R. 252. 1 East. 276. 120. 526.

2<sup>d</sup>. Settlements may be acquired by marriage.  
On y husband's marriage, his settlement is communicated  
to y wife, y law not permitting y separation of  
husb. & wife.

Str. 544. 1 W. 363. Bar. set. cas. 62. 371.

If then a woman settled in Litchfield marry a man  
settled in Hyde Park - Hyde Park is y place of  
her settlement. & she "ipso facto" loses her maiden  
settlement.

1 Blk. 363. Sub. 528. 9.

Brw. set. cas. 122. 370.

And it has been decided, yt. if y husb. have no  
settlement. as if he is an alien, hers is susp.  
ended during y coverture, but is revived on y  
husb's death. \*

Brw. set. cas. 122. 370. 544. 683.

But this is now denied as to the susp. endow.

1 Root. 232.

But it seems now settled, yt. if y husb. (having  
no settlement.) does not remain with & support her  
in y realm, or being in y realm does not, her mai-  
den settlement continues. Indeed y Ct. held uncon-  
ditionally, yt. if he had no settlement, hers is  
not suspended.

Brw. set. cas. 257. 370. 2. 3. 122.

And in y last case, her children by y marriage,  
are entitled with her, to her maiden settlement.

Brw. cas. 257. 72. 12. 122.

Finis "Glover & Ward"

Litchfield Sep. 20th.

1826.

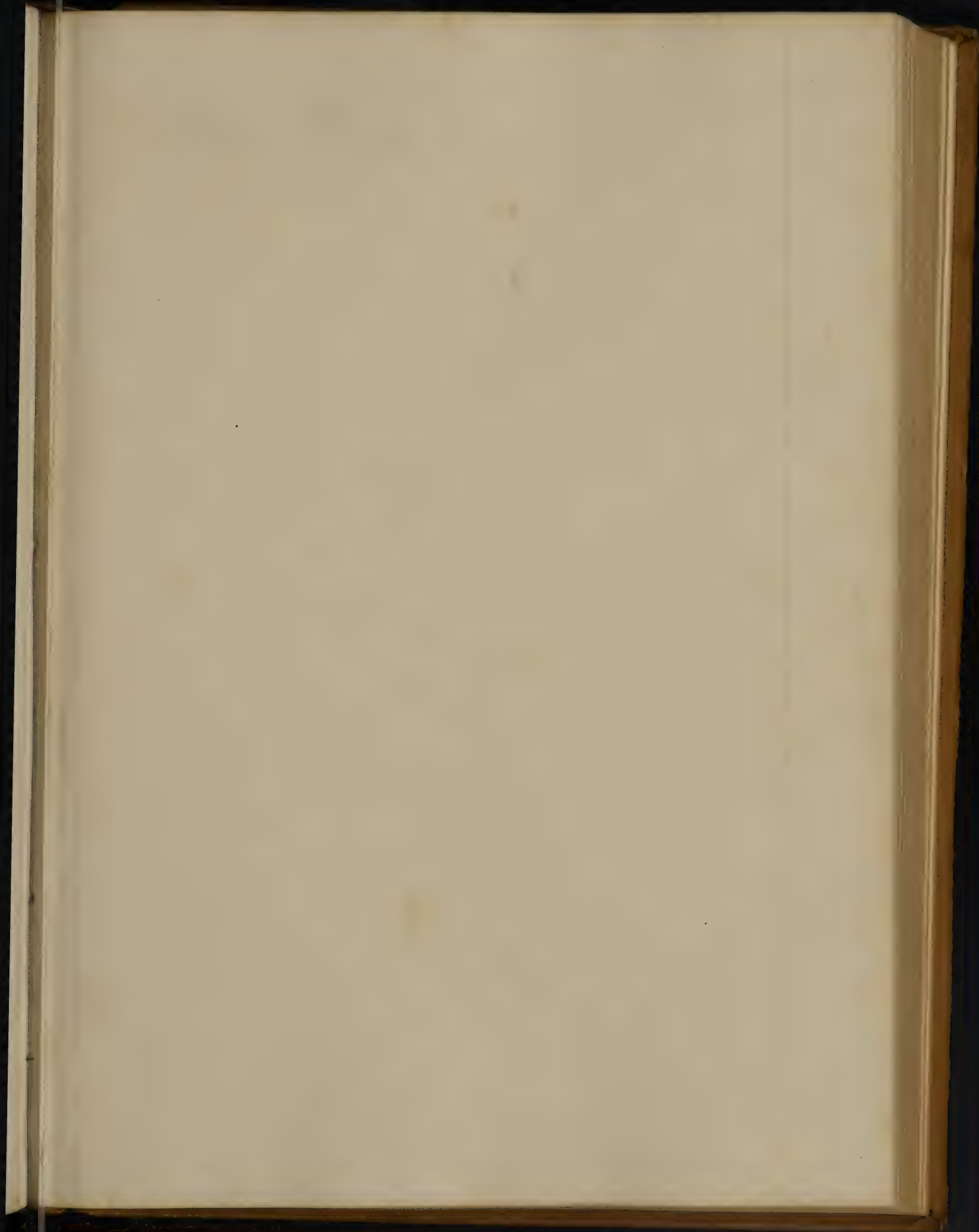
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\* If a woman having a settlement, & her husband has a settlement, and  
she marries a man with none, her settlement remains  
The question was, whether it was suspended, and if so, when it  
was revived, and if not, when it was revived.

It was held, that it was not suspended, but remained  
in full force, and was not revived again.

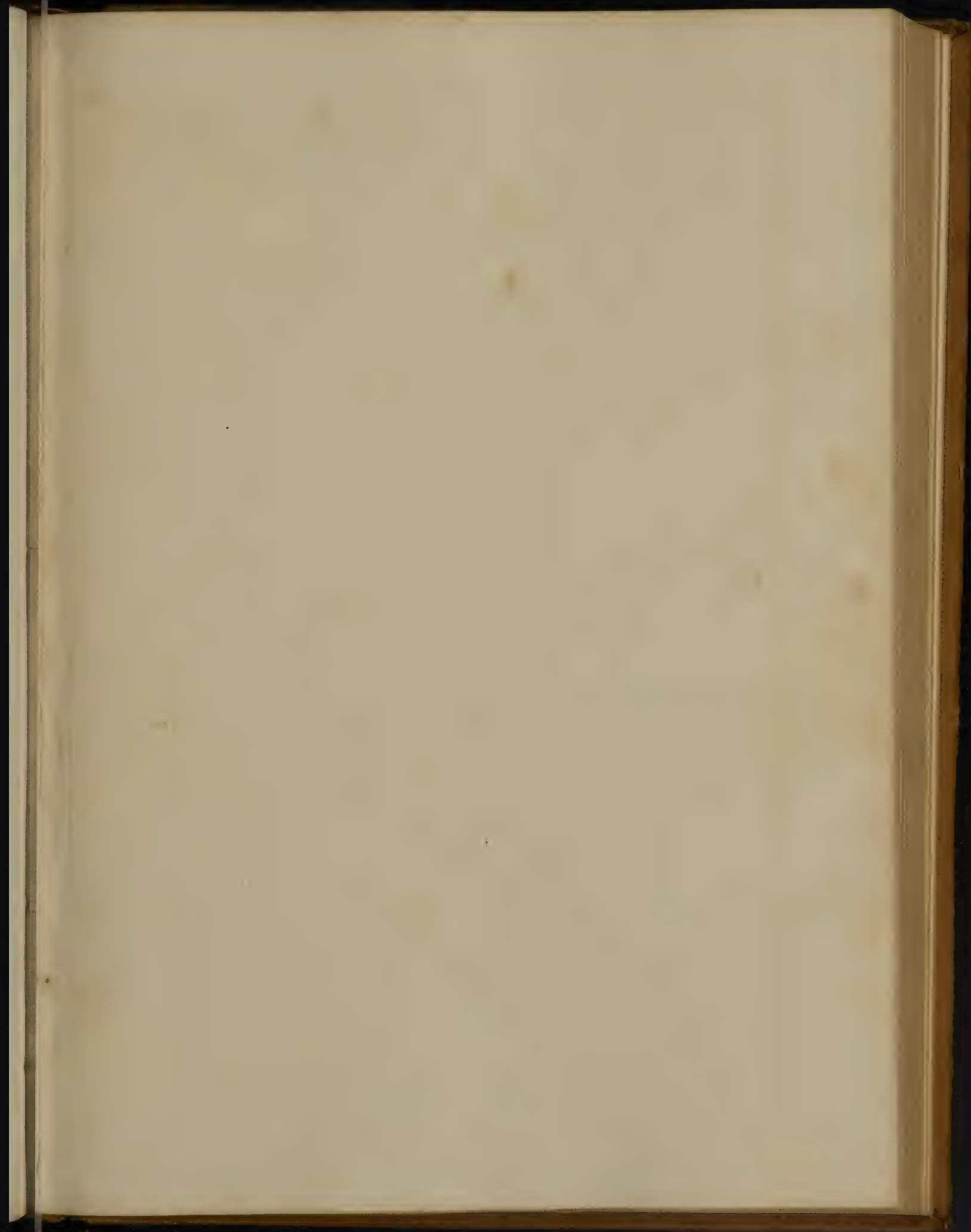




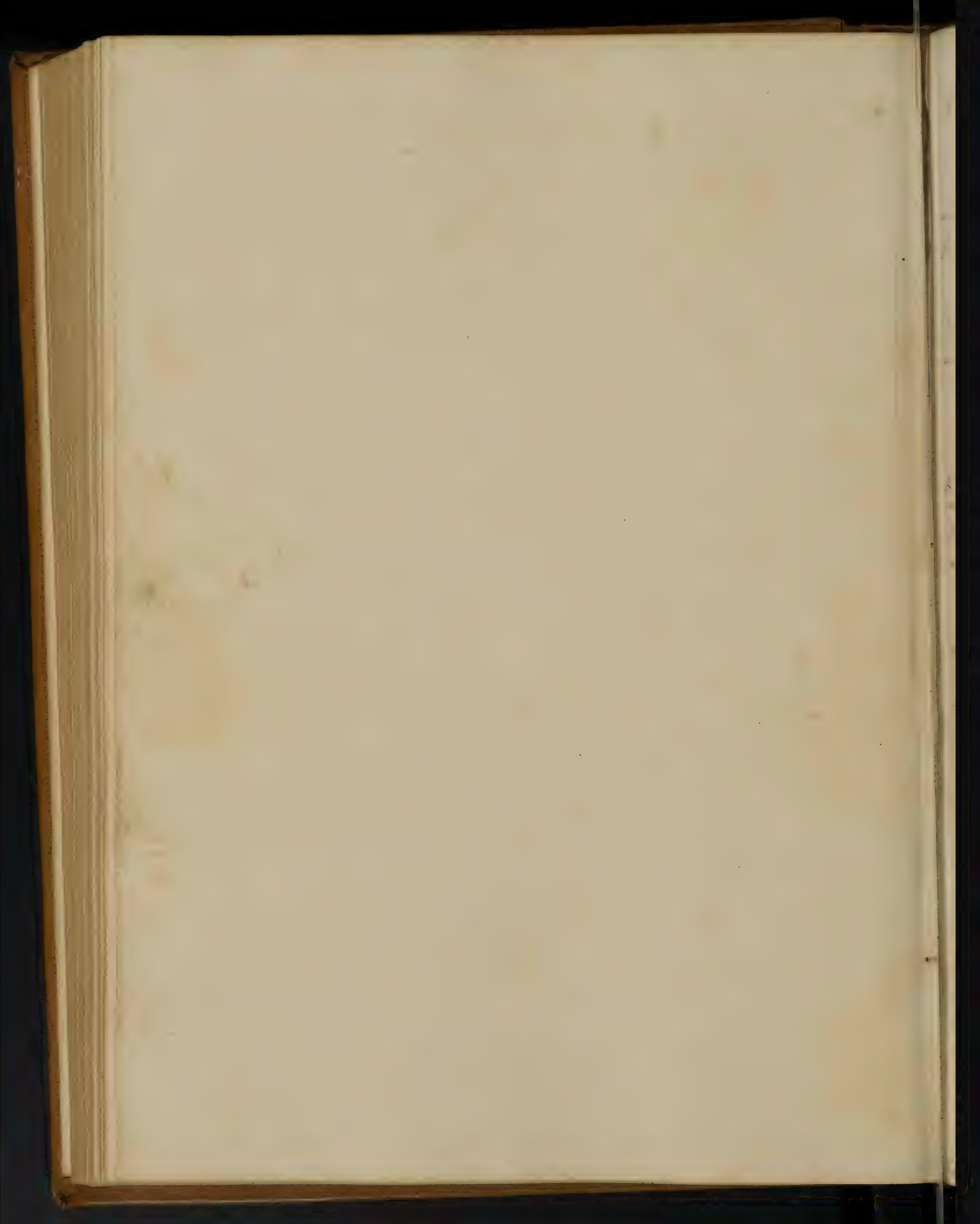












## Master & Servant.

Oct. 24<sup>th</sup> 1826.

A servant is one who is subject to personal authority of another. Not to public or social authority of another.

A master is one who exercises the authority. The authority is personal - Subjection to civil authority is not provided.

The authority exercised by a master, is only by virtue of compact with a servant or his Guardian but not always - Thus in case of slaves it is not such as exists at a South.

The kinds of Servants in Kent. are 5. When sincere is not known. there are but four.

1. Slaves. 2. Apprentices. 3. Menial Servants. 4. Day-laborers. 5. Agents of any kind, as Factors, Brokers, Stewards, Bailiffs, Shipmasters Attorneys.

Walk. 660. 20ft. 1 1831. 423-7 - 1832. 954-9-

The first of these kinds are unknown to the C. L. of England.

First, Slaves - It is doubted by many whether slavery is legalised in Kent. - By the C. L. it is not, but it has been by Statute. - And if legitimate Slavery exists it must depend on natural law, the com. law or our own local laws.

Next, according to natural law, Slavery must be authorised at all, by a State of captivity in war, by contract, or by what is called a negative form of right, i.e. by being born a slave. Barbemagui 211 19.



I. By Captivity. It has been said that the captor has a right to kill his captive & therefore to enslave him. But by the law of nature, as explained by the best authority & as recognised by the practice of the most civilized nations this right to kill don't exist, unless in case of necessity of necessity for self defence. & in the case of actual capture this necessity can't exist in favor of the captor.

II. By Contract. This cannot be a foundation of strict slavery, wh. implies an absolute right over a man's person & liberty of the slave.

And as the Law says, 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

For he cannot make an absolute sale of his liberty, for this will imply an obligation to obey unlawful commands & destroy his free agency, & as after such a contract he can have no right of property, there can be no consideration for such a sale. No "quid pro quo" ergo; contract can't bind on principles of C. L.

But a contract to serve another is good, it is nothing but a sale of one's labour.

III. By Birth. This supposes a slavery of one's person created in one or other last mentioned ways, & ergo a foundation of a claim fairly.

Second. The C. Law don't recognise any species of private slavery, nor can a local law of any country be enforced in Eng. in favour of slavery.

Indeed a foreign Slave becomes free on landing in  
Eng. where he is ~~he~~ protected in 3 rights of pers.  
and liberty, personal security, & private property.  
Tent. 22. 6. 1. 125 66. 1. 1.

There were in Eng. under 3 feudal system,  
what were called villains, but they were never  
absolute Slaves. 1st. sec 184. 204. 2 Bl. 94.

The Lord ~~did~~ not mean to kill them - This  
species of slavery arose from 3 feudal tenure  
of Villenage.

But there are no Feudal villains in Eng. now.  
For 3 tenure in Villenage was virtually abolished  
by 3 Mt. 12. Ch. 2. & at yt. time it is so yt.  
There were but two villains in Eng. 2 Bl. 96.  
1st. 8. 3 Hum. Hist. Eng. 307. Indeed 3 character was hardly  
known in Eng. in 3 reign of Eliz. 3 Hum. 307.

Third. <sup>up</sup> If our Local Laws a qualified slavery  
is legalized - We have no Stat. expressly  
authorizing 3 holding of slaves, but we have  
Hs. counting upon 3 existence of slavery &  
making provision exclusively for slaves - As  
vs. 3 irregular conduct of slaves - providing  
particular punishment for crimes committed by  
them, obliging masters to maintain emancip-  
ated slaves, providing 3 mode of Emancipa-  
tion, to exonerate 3 Master.

Long acquiescence of 3 Legislature in 3 known  
practice of holding slaves furnishes also a  
strong argumt. in support of this opinion.

Besides our Superior Ct. has several times  
manifested an opinion yt. slavery is legalized  
here, & 3 doctrine is supported by judicial decisions.



That it has been decided by 7 Sup. Ct. y<sup>t</sup>. a master can't maintain trover for 3 servant. it has also been determined y<sup>t</sup> a slave may be sold or taken on execution.

3 Bbl. 185. 2 Geo. 201. 2 Ld. Ray. 1274. Vabb. 656.

The reason in y<sup>e</sup> first case is y<sup>t</sup>. a slave is not a subject in wh. an absolute property can exist any more than in a child or apprentice since y<sup>e</sup> reason or body of y<sup>e</sup> slave is not y<sup>e</sup> master's property. The y<sup>e</sup> services are.

Hence, it follows, y<sup>t</sup> an action for taking away a slave must be y<sup>e</sup> same as for taking away y<sup>e</sup> apprentice. (if which see post)

Vabb. 656. 2 Root. 384.

cont. 3 Bbl. 185. 2 Geo. 201.

But strict absolute slavery never existed in Court. For y<sup>e</sup> master has clearly never had any power over y<sup>e</sup> slave's life. And it has been settled y<sup>t</sup>. a slave may hold property & sue for it by his next friend. He may sue his master.

It has also been decided by 7 Sup. Ct. y<sup>t</sup>. marriage of y<sup>e</sup> slave with consent of y<sup>e</sup> master, is an Emancipation - because, he thus contracts with y<sup>e</sup> master's consent, a relation thought to be inconsistent with a state of slavery.

Upon y<sup>e</sup> same principle y<sup>t</sup>. minors are emancipated see y<sup>e</sup> last part of Stewart's Case. I doubt whether this sh<sup>d</sup>. be considered Law. It was a rule of y<sup>e</sup> Ex. L. y<sup>t</sup> a male or female villain wasn't emancipated by marrying another. A female villain is called a maife.

A <sup>maife</sup> wife however, is not emancipated by marrying a villain, but brings no contempt of y<sup>e</sup> Lord is supposed.

On 3 other hands a <sup>wife</sup> is emancipated during  
coverture. if she marries a free man - & forever, if  
she marries her lord.

Co. L. 123. a. n. 136. b. 137. 6. Lit. sec. 187. 2 Bl. 92. 4. Perk. 314.

Is an illegitimate child a slave by birth?  
By 3 civil law he may. for "partus sequitur  
ventrem". In 3 Eng. law of Villenage 3 condi-  
tion of 3 child follows pt. of 3 father, & in law  
an illegitimate child may not gather. Expt.  
under 3 general law an illegitimate ch. not be  
a villain by birth. But a legitimate child  
born of a slave or villain is a villain.

2 Bl. 92. 4. Lit. sec. 187-8

In Court. according to universal usage 3 will  
of 3 civil law has prevailed.

The owner of 3 mother is 3 owner of 3 child in our  
country - Slavery now is almost abolished in Court.

Importation of slaves is prohibited. St. L. 1784. 18  
of all children born of slaves after March  
1784. 18 before 3 1<sup>st</sup> of Aug. 1797. are free  
at 3 age of 25 - Those born after 1<sup>st</sup> Aug. 1  
1797. are free at 21.

Importation is now forbid by M. C. 4<sup>th</sup> Oct. as  
it previously was by 3 law of all 3 several  
states.

It has been agreed genly. yt. offenders may  
be judiciously condemned to slavery for crimes.  
As confinement in labour in St. Gall & other pen-  
itentiary houses - This is a qualified civil sla-  
very - a Slavery to 3 public.



## II. Apprentices.

These are so called from apprentice (to learn) being you bound for a term of yrs. to serve their master yt. they may receive instruction.  
136. 426.

Usually bound to a professor of some mechanical art, but sometimes to husbandmen & others.

They must be bound by deed. - Qu. Reg. & C. L. & only by St. & to Elix. C. 4. § 238.

Reg. & Com. L. it might have been by deed.  
4th 2 Term. 65<sup>th</sup> 5 Rebl. 103. 1108. 182. D. R. 1117. Statk. 58.

A usual contract in apprenticeship is not binding.

For can a defective contract of apprenticeship be construed into a hiring of another kind.

as from yr. to yr. - 8 T. R. 379. - Gay lord vs. Riggs.

Ship. Ct. of Court. 1808. We have no such Stat. as yt. of Elix. but our Cts. have adopted a same rule as a contract must be by deed.

It has also been so. yt. a relation of Master & apprentice can't be created, in the latter is expressly retained in a deed by a name of apprentice. See 456. Down's justice

But this is denied to be law. 8 T. R. 379. West 537. but it is a safer way to insert a word "apprentice". Other servants may be retained by deed. 3 Bacc. 541.

In Eng. & children of poor persons (paupers I suppose) may be apprenticed out by a overseers with a consent of two justices till full age. This is by virtue of several Acts, 136. 334. & those to whom they are offered were compelled to take them. 136. 426.

the Court. also it is provided, yt. if children of  
paupers, living idly murthering their time &c.  
poor children living idly & exposed to want - any  
children not completely provided for & exposed to  
want, & children grown idle stubborn & unruly  
may be bound out as apprentices by 3 select  
men with the advice of the next assistant to justice.  
males till 21. females till 18.

All servants except apprentices are entitled  
to wages for their services. The wages of menial  
& in Court. if all others also, are settled by  
contract, those of servants in husbandry by 3 sher-  
iff or justices in Eng. 1 Bl. 428.

Apprentices are regularly entitled  
to no wages i.e. 3 law implies no contract for  
3 part. of them, yet they may have wages  
by express contract. 1 Bl. 428. 5 D.R. 579.

By 3 Stat. 5 Eliz. it is enacted yt. minors  
may bind themselves by indentures of appren-  
ticeship. But as 3 privilege of infancy is not  
expressly taken away by 3 Stat. i.e. not ex-  
pressly enacted yt. 3 inf. shall be liable on 3 costs.  
it has been uniformly helden yt. an inf. is not  
liable on 3 costs. & yt. 3 only effect of 3 Stat.  
is yt. while 3 relation actually continues under 3  
contract, 3 parties respectively enjoy 3 rights &  
incur 3 duties resulting from yt. relation, & yt.  
3 minor if he serves 3 full term shall be free  
to use his trade. 1 Bl. 428. Cro. E. 179, 448. Doug. 501. n. 518.  
5 D.R. 716. Mod. 190.

also such Stat. in Court.

But if 3 father or guardian join in 3 indenture  
he is bound by his contract by 3 Com. Law.



He is liable for non performance of what is to be performed by an apprentice. Long. 500 in 5th. 8th. 190.

See 2 Steph. R. 228. y. when an indenture is in common form, a Guardian is not bound by court. y. an apprentice shall faithfully serve &c. & not absent himself.

Thus if a Guardian expressly binds himself i.e. expressly binds himself in his own name for performance of all the costs. 2 Steph. R. 228.

The parish indentures or town indentures now, a parish officers do not court. as they act for a public duty are not required to subject themselves to any personal liability.

2 Burr. 55. 5. Long. 501. 518. n.

Misuser i.e. any abuse is a good cause for an apprentice leaving his master. 1, 4th. 518. 13th. 425.

An apprentice can't be discharged otherwise than by deed. it is so.

The obligation must be dissolved "ex ligamine quo ligatur" The ant. of this rule appears to be merely y. he is not discharged by any agreement, not executed, nor it be in deed, nor it course by a verbal license retracted.

2 La. R. 1117. 3alk. 58. 5th. 182.

But y. a relation may be dissolved by mutual consent see 2 La. R. 109-10. This must suppose an actual abandonment of a relation in pursuance of a contract; for as an agreement, not executed, it does not discharge an indenture.

Cancelling or delivering up an indenture must however discharge an apprentice; for a deed no longer exists as a deed.

2 La. 582. 236. 325 330 331. 271

in 1797. 1798 126.

1 East. 196 200 Long. 287. 17th. 638.

Burr. 2d ed. 542. 4th. 557.

And our Sup. Ct. has holden yt. a master  
having discharged a apprentice by bond contract  
might not maintain an action vs. a apprentice  
father. The master caused & authorised a dep-  
arture & was guilty indeed of a wrong in ma-  
king a agreement with a apprentice.

Bankruptcy of a master has been said  
to discharge a apprentice, but this does not  
of itself discharge. The a sessions will it is said  
discharge. *11th. 582. 12th. 149. 3 Bac. 550.*

He may be discharged in Court by County Ct.  
for default of a master. *St. Court. 294. &*  
a apprentice may be punished by Co. Ct. if  
he is guilty of mis-conduct.

The same thing is done in Eng. by a quarter  
sessions & in some cases by 2 justices or by one on  
appeal to a sessions. *13th. 426. 3 Bac. 550. &c.* And the  
default of master or apprentice. But this is done  
in Eng. only in cases in wh. a binding was by au-  
thority of 3 justices. ante 101.

If a apprentice marries with his master's con-  
sent, a letter may not for this cause turn him  
away; he must take his remedy in a court.

*2 Kern. 422. 3 Bac. 550.*

A master can't at C. L. assign his appren-  
tice, a contract being fiduciary. His rights are  
founded on a personal trust not transferable.

Decided by a custom of London.

*1 Kelt. 250. 12 Mod. 553, 4 Hob. 135.*

*3 Kelt. 519. 3 Halk. 68. Doug 57.*

If on submission to an arbitrator. there shall  
be an award yt. an apprentice shall be assigned  
a award is void in it be by custom or consent



if  $\gamma$  apprentice. *Str.* 1267. seems by  $\gamma$  customs of London. This assignmt. is like  $\gamma$  assignmt. & chose in action.

That tho' at C. L.  $\gamma$  assignmt. of an apprentice does not pass  $\gamma$  masters right or int<sup>y</sup> in him, it is good as a c<sup>on</sup>t. or agreement. to bind  $\gamma$  assigna. Tho'  $\gamma$  words are only "grant & assign" i.e. th. are words of grant merely & no express c<sup>on</sup>t. & if  $\gamma$  apprentice serves under  $\gamma$  assignmt. he may gain a settlement by it in Eng. But he is not compellable to serve nor can  $\gamma$  assignee maintain an action on  $\gamma$  original indenture.

*Halk. 68. Ld. R. 682. Bous. 67. Will. 26.* Even if  $\gamma$  apprentice agree to serve him & then leave him.

If he do not serve according to  $\gamma$  assignmt.  $\gamma$  master is liable on contract to  $\gamma$  assignee.

If  $\gamma$  master can't assign his right in  $\gamma$  apprentice, so he is bound to keep him under his own care. He may not send him abroad even to improve in  $\gamma$  by agreement. or in the nation if  $\gamma$  business requires it.

*8 Mod. 256 1270 136. Holt. 139.5.*

The Exec. of  $\gamma$  master can't hold  $\gamma$  apprentice. The masters right is not transmissible,  $\gamma$  contract to serve & teach being fiduciary.

*272. 35. Halk. 68.*

*Str. 1267. Ld. R. 682.*

But it has been holden yt.  $\gamma$  exec. is liable on  $\gamma$  c<sup>on</sup>t. when  $\gamma$  c<sup>on</sup>t. to teach is absolute, & is bound to procure him instruction.

This has been denied, & I think justly.

*1 Leo. 177.*

*1 L. Corp. 216. 2 Tho. 1262*

*Maitland's law post p. 276. Halk. 66.*

Whether a master's Exec. is bound by a court to furnish board, clothes, &c. to a apprentice during a term, has been a question, accordg. to the current of authorities, he is liable, when a court is absolute, to board, clothe &c. during a term.

Bro. G. 552. 1 Ch. of. 216 1 Stark. 31. 1 Hble 787. 820. May. 50.

Suppose a Exec. not named in a court. This J. G. conceives can make no diff. He is bound if at all with naming.

These authorities it has been so. by some are hardly agreeable to principle; for as the necessities are to be furnished genly. in consideration of service & as a Exec. has no right to a service, he ought not perhaps in justice be liable for a necessities. But if a master court. unconditionally to furnish them for a fixed period, how can such liability be avoided with impairing a contract? It is like a contract to pay rent for a term of yrs. & a building leased is burnt during a term. - in this case he must unquestionably pay a rent.

If a premium is given, a Exec. (as all agree) ought to provide maintenance, or restore a proportional part of a premium.

In Eng. L. has in some cases ordered a part to be restored, on masters dying soon after a apprenticeship commenced, & has been decreed a large proportion to be restored when a small one had been agreed upon between parties.

1 Kern. 460 1 Atk. 159.

This is going very far. The master's death has been anticipated & provided for.



If a master on turning away an apprentice has  
been decreed in Chy. to refund a part.

3 Bac. 550. 2 term. 64. 10th. 149.

Also on a master becoming a bankrupt & abandon-  
ing his profession. ante 14.

And when in Eng. justices discharge an appren-  
tice, they may order a master to refund a part  
of a premium tho not expressly authorised by any  
stat.

1 Bl. 28. 10th. 67. 490 3 Bac. 550.

1 Dougl. 314. 11. Mod. 110.

Whatever an apprentice earns by his labor, while  
apprenticeship continues, belongs to a master; for  
all his services are a master's. 11th. 582.

1854. 53. 5 Mod. 69. 12 Mod. 415. Co. Lit. 117. n.

And an apprenticeship "de facto" will sup-  
port a claim. as when a contract of appren-  
ticeship is void or not by deed.

10th. 68. 6 Mod. 59.

Propy. of any kind thus earned by a ap-  
prentice may be recovered by a master as his  
own in any proper action. as if a appren-  
tice work at night. times upon a watch it vests  
in a master. \* And a rule holds, tho a  
labour is performed witht. a master's consent  
& not in a line of a master's occupation. 11th. 117. n.  
5 Mod. 69. 12 Mod. 415. 1 Ves. 83. 11th. 582. 10th. 68. (in an act. \*)

The last rule does not hold it seems in the  
case of other servants. except slaves. In a case  
of other servants a master cannot recover a  
servant's wages. His proper remedy is an action  
on a case for loss of service, if a employer  
knew of a former retainer. Post 63. 20. or an  
action vs. a servant himself for breach of contract.

If an apprentice or any other servant is enticed

from a master's service, an action lies vs. the  
entire. Co. L. 119. & Bro. J. 88. & L. 67. & Bac. 567. 558.  
Comp. 56. & And a journeyman is a servt. within  
a rule. ib. 8. 1 Mod. 489. n.

In taking away one's servt. with force, "tres-  
pass" lies. <sup>with or without force</sup> & enticing him away, "case" is, on  
principle & only remedy. 1 Day. 105. 2 L. R. 1117.  
Halk. 380. 2 J. R. 167. L. R. 1032.

But in Corp s. 6. & wrong was "enticing" &  
action <sup>trespass</sup> & it was supported. Tresp. can't lie for  
merely enticing; but trespass on a case.

1 Lilly's entries 72. or Moreson's entries

In Eng. apprentices gain settlements in the  
parish in wh. they <sup>serve</sup> & last 40 days by Yt.

In Cont. being under age they gain none,  
for an apprentice does not maintain himself  
as our Yt. requires to gain a settlement by  
residence for he is not emancipated.

By our Yt. apprentices & other minor  
servts. absconding witht. sufft. cause are li-  
able at full age for all & damage occa-  
sioned. This considers & contract binding.

### III. Of Menial Servts.

These are servts. employed "intra moenia" - Do-  
mesticks. 1 Bl. 425.

If a term of service is not fixed by a  
contract, & hiring is in Eng. construed to be a yrs.  
upon & equitable principles - yet one shall serve  
& 8 other maintain thro' 3 years - 1 Bl. 425.  
Litr. natura Domini 168. & Bac. 546. No such rule  
in Cont.



In Eng. by 3 Stat. 3 Eliz. a servt. in certain cases  
can't leave his master. no can masters dismiss their  
servts. either before or at 3 end of 3 term, without  
a quarters notice. is allowed by a justice.  
In Scot. see in Cont. 1 Bl. 425-6.

But 3 servt. it is sd. may be turned away for  
incontinence or any moral turpitude. 1 Bl. 425. 6th. note.

#### 22. IV. Of Poor Labourers.

There are no genl. rules applicable exclu-  
sively to these, except in Eng. by Stat. 3 Eliz.  
& 3 Geo. 1<sup>st</sup>. \*

They may be retained for any period, we  
have no similar Stat. - (1 Bl. 426-7. \*)

These Stat. provide, nt. all persons hav-  
ing no visible effects may be compelled to  
labour. The justices at 3 sessions are to  
settle their wages. Penalties are inflicted on  
those who give or exact more than a certain sum

In Cont. they have no Stat. of this kind.

#### V. Of Agents.

As factors, Brokers, Stewards, Bailiffs, Whips-  
masters, Attorneys &c. These are servts. in relation  
to such acts only as affect 3, by 3 of their em-  
ployers. 1 Bl. 427. 1 Wood. 269. 2 Amb. 252. 297. 8.

As to 3 classes of persons falling under this denomi-  
nation, see ante. 1.

The principal has not the same genl. control over them as a master has over a common servant. They are not subject to his domestic government, like other servants. - Tho- they are bound by law to act for him according to their contracts.

As to the rights & duties of this kind of servants, & 23.  
their employers it is difficult to lay down  
genl. rules. - 1 Wood. 469.

Every Factor \* Broker &c. ought strictly to pursue his commissions (or instructions) for his own security, as he is not then regularly liable for casual losses; never he is. - 1 Wood. 469.  
Comm. Dig. "Macht. B."

A <sup>\*2</sup> Factor is a commercial agent in a foreign country - A Broker is one residing in the same country with the owner.

A Factor may retain the goods of his principal in his hands, to satisfy a genl. balance of accounts in his favour. <sup>3</sup> As to goods specially deposited with him for a particular purpose. 6 D. R. 258. Exp. 108. to 206. This lien is not confined to goods wh. he may then hold, but extends to any wh. he may hold. But by giving up possession to the principal the lien is lost, for the lien, being founded in possession, is then abandoned. - #

4 Amb. 254. - 2 Bl. R. 1154. Exp. D. 108. 584.

1 Burr. 493. 1 East 335. 4. 1 Bl. R. 104.

2 East 227. 523. #

He has the same lien upon a policy of insurance effected by him on the goods of his principal.

Marshall on Ins. 121.

1 Burr. 494.

He has the same lien on the price of the goods in



holder of any person to whom he has sold them.  
Comp. 256 - & may compel y venditor to pay him.  
(\* C. 2. 2. 254. Dig. 108. N. Y. D. 206 belong to last page)

24. But a factor has no lien on y principals goods in they come to his actual possession. Construction possession (i.e. a right to remove possession) is not sufft. 2 Ves. 117, 1 Atk. 134, 3 D.R. 119.

They do not become a pledge till actual delivery, - possession being essential to a lien.  
See Bailment. 87.

The rules relating to a factors lien, are part of y "Law Merchant" & are derived from y<sup>e</sup> Law. Com. Dig. "Merchant."

A Carpenter has no lien on a house wh. he may have built &c. -

If y factor gives more or buys less than his commission warrants, his principal may disclaim y purchase. & if he sells at a less price he himself must bear y loss. 1 Ves. 510. Com. Dig. "Merchant." B. 2 Mod. 100. If he purchase more he himself must retain y surplus & there is no ground of disclaimer. Tho tho y goods are perishable. maxim obay venditor, break owner)

(cont. 1 Com. int 250. (3 B & P. 489. 11 B. 400-7. 100)

Tho if he sells on credit, in authorized to do so by his commission. 2 Mod. 100. 1 B. 13. 132. 132.

(contra 3 B & P. 489. 11 B. 406. 100 b. 1111 or 132.

Qu. Whether y rule is not still law in contravention by usage, at y place of consignment.

Com. C. 23 b. 6 John 69. 1 Campb. 258. J. G. thinks it is. By commission order he may sell on credit, but must guarantee y sale. - 1 D.R. 116. - 3 B & P. 495. 1 Camp 445.

A factor has no right to pass & goods of his principal as his own, for his own debts; & if he does, & principal may maintain Trover vs. & Pounce (on tendering to & factor & balance due to him witht. any tender to & pounce) The factor's lien being a personal right, which can't be transferred. - 5 T.R. 604-5, B. & P. 638. & East. 5.

Com. Dig. Mch. B. 1. Otho. 1178. & 14 B. 362.

And it seems now settled yet no tender at all is necessary.

For & pawning is tortious. It is a breach of trust.

Qu. Might he not pawn them for his principal. I see no reason why he sh. not.

But if & factor delivers them over as his & principal's, tho' to secure a debt of his own (within & amt. of his lien) with notice of his lien; the creditor (& Factor's pounce) may avail himself of & lien it seems (& East 5) for in this case & pawning is not tortious, & & possession is for & factor. - There is strictly no transfer & & lien attempted, & there is no new risk or danger incurred on & part of & principal. For & factor is answerable for & acts as his servt.

But he may sell & principal's goods; for merchandising consists in buying & selling; & may in his own name sue & vendee for & price. 107. 204. 14 B. 82. 362. Com. Dig. 256. & T.R. 359, Bul. ni. pi. 130 vide Bailment, 111. For he has a beneficial interest in commission, & <sup>ergo</sup> sues in his own name. 1 B. 21. 5 1 D. R. 112. 2 Esp. R. 493.

So Brokers & Policy Brokers may sue in their own names. So ship captains for freight. & agents.



Bank. on Prop. 403.

In all these cases, however,  $\gamma$  Principal might sue.  
Ch. Pl. 5. 1 H. Bl. 81. 7 T. R. 359. 360. n. a.

I take  $\gamma$  reason why  $\gamma$  factor may sue in his own name is, yt he sells in his own name. 1 H. Bl. 81. 200. 594. He an auctioneer (who is a species of Broker) may sue for goods sold by him, as auctioneer in his own name, & even tho they were known to belong to another. He like a factor, contracts in his own name & has a commission. 1 H. Bl. 81. 200. 591. 2.

But if  $\gamma$  factor's Principal (not being indebted to  $\gamma$  factor) gives notice to  $\gamma$  purchaser, to pay to himself & not to  $\gamma$  factor, & purchaser is not justified in paying to  $\gamma$  factor. Esp. 107. <sup>204.</sup> 204. 1182. - he does it at his peril.

\* Addition if there is a balance due to  $\gamma$  factor from  $\gamma$  Principal. - The factor in this case has a lien on  $\gamma$  price in  $\gamma$  order of  $\gamma$  goods in  $\gamma$  hands of  $\gamma$  vendee (seller) a right prior to yt. If  $\gamma$  Principal. Esp. 128. 129. 204. 251. 5. 2 East. 227. 3 Bos. & P. 435. 1 Campb. 448.

26. In each of  $\gamma$  preceding cases, however, action may be by  $\gamma$  Principal. 1 Ch. Pl. 5. 1 H. Bl. 81. 7 T. R. 359. 360. n. a.

\* If  $\gamma$  Principal & factor both give notice to  $\gamma$  vendee the duty to him, for his own safety, & vendee may bring both of them before equity.

An auctioneer is not liable for selling goods to  $\gamma$  highest bidder tho for a less sum than the owner directed. In  $\gamma$  act of setting up goods for sale at auction, anto. to a contract with  $\gamma$  assign. yt.  $\gamma$  highest bidder shall have them.

But he is bound, by instructions to set up  
goods, in 3 first instance at a particular  
price. Coop. 398.

Ther for of commercial agents.

An attorney also has a "lien" on 3 papers and  
judgt. of his client for his fees, & may direct  
adverse party to pay 3 costs to him & not to  
his client. # But 3s right is subject to 3 equit-  
able claims of 3 adverse party upon 3 client.

Ex. Gr. a claim to "sett off." 8 T.R. 70. 571. 1 East. 668.

Long. 100. 238.

1 H.B. 24. 122. 217. 657. 200. 330. 587.

2 Bl. R. 826. 3 T.R. 123. 170 561. 456. For 3 Atty. can't have a high-  
er right vs. judgt. seller, than his client had.

# The rule does not hold of coun-  
sel fees nor to counsellors, only to costs for 3  
attys. -

An Atty. who executes an instrument, for his 27.  
Principal, shd. do it in 3 principal's name,  
not in his own. Ex. L.S. by his Atty.

2 Bl. R. 826. 3 T.R. 76. 6. 1705. 2 Ld. R. 1418.

3 Bac. 140. 6 T.R. 197. 1 Roll. 330. 501. 3 Bac. 408.

Title by Deed 35. 2 East 142. 1 T.R. 181. 1705.

Heus he binds himself. Whit.  
on Bills 247. 56. 75. 1705. 953. 1 T.R. 181. 3 T.R. 75.  
But no particular form is essential.

An agent can't bind his principal by deed  
without an authority for yt. purpose by deed.

3 T.R. 207. 907. 8 2 Bac. 408. 4 T.R. 313.

2 Roll 8. 3 Com. Atty. 3. 15. Title by Deed 36.

For as no one can be estopped by any act of  
his own less solemn than a deed, he can't by any  
means less solemn, subject himself to an estop-  
pel by 3 act to another.



An agent for a public, contracting as such  
is not personally liable for his contracts. *Morton*  
13 R. 172. 676. 1 East 552. Post 325 - *Mr. Dexter's case* as *Deq. Chas.*  
*Let. W. G.*

The remedy of a third party, is an application to  
the Government. - \* The principal is the same as in private  
agencies - When he makes a written contract, it shd.  
appear on it y<sup>t</sup> he is acting as public agent.

\* Altho. no action can be brought vs. Govern-  
ment, its justice is excepted.

Ther. can no action be brought against  
government? comp. none can.

## 29. Rules applying to Masters & Servants genlly.

When a master is bound by & can take ad-  
vantage of a servant.

General Principle. Those acts of a servant. sh.  
are done by a master's commands express or implied,  
are in legal contemplation, & acts of a master, and  
regularly all acts done by a servant. in a per-  
formance of business, in wh. he is employed by a  
master, are deemed to be done by a master's  
commands - "Qui facit per alium facit per se"

13 Bl. 429. 2 H. Bl. 442.

30. Whatever a servant. does by express com-  
mands of a master. & whatever a master permits  
him to do in a course of his business - & what-  
ever he does within a scope of genl. authority  
given by a master, are acts of a master.  
For these acts are all done in a performance of  
business, in wh. a servant. is employed by a master.

A contract made by a servt. as servt. (he being authorized to make it for his master) is made in legal contemplation, by a master himself. Ex.

A promise by or to a servt. on a master's account. 3 Bac. 559. 2 N.R. 411.

If a servt. is cheated of his master's property or goods, a master may recover it back, by action vs. a wrong-doer. 1 Roll 98. Co. l. 223.

3 Bac. 558.

If a servt. is robbed of a master's goods in a absence of a latter, either master or servt. have an action vs. a hundred in Eng. for a robbery. Statk. 613. 3 Mod. 289. 4 Do. 303. 11 Mod. 8. 12 Do. 54.

The master may sue because a goods are his &c.

The servt. may sue it is so. by reason of his own liability to a master. Qu. & to a reason, for he is not liable, *crimine facie* in case of robbery.

The true reason is y<sup>t</sup>. a goods are considered as a servt. as w<sup>th</sup> all persons except a master. See "Bailm<sup>t</sup>." 105-10-12. & in an action in respect as tho. a goods were his own. 2 Ld. Raym. 579. 3 Mod. 289. Statk. 613. Policy may require it.

Ex. The master absent at a distance. - And a recovery by either says a others action - and a commencement of an action by one, prevents the other from prosecuting. Statk. 127.

When a servt. sues, he declares on a possession as if his own goods, in they are not as vs. all, except a master. 2 Ld. Raym. 579. 3 Mod. 289. Statk. 613.



32.

But if  $\gamma$  servt. is robbed in  $\gamma$  presence of  $\gamma$  master. &  $\gamma$  master's goods.  $\gamma$  master only can sue.  
 Clark. 613. Lamb. 145. 1 Hawk. Pl. C. 148.

For in such case  $\gamma$  taking is deemed to be given  $\gamma$  person of  $\gamma$  master. 1 Hawk. 148. Public wrongs. 68 n. - & yet besides there is no necessity of allowing  $\gamma$  servt. to prosecute.

If  $\gamma$  master's money is gained from  $\gamma$  servt. by an illegal contract,  $\gamma$  master may recover it back. Issue, if  $\gamma$  servt. squanders it, there being no fraud in  $\gamma$  other party; nor any illegal contract. Ex. If he embezzles it, in paying it on his own use, to a bona fide receiver (3 Bac. 559.) Here  $\gamma$  party receiving it, being guilty of no fraud or crime,  $\gamma$  servt. only is in fault. (The maxim here applies yet shows one of two innocent persons must suffer by act of a third, he must suffer who put it into  $\gamma$  power of  $\gamma$  third person to so squander.)

If an Inn keeper's servant steals  $\gamma$  guest's,  $\gamma$  master is bound to make restitution, see "Inns & Inn Keepers" 1 Bl. 430. 1 Roll 2. 8 Co. 32. Durr 266.

33.

So if a servt. of an Inn sells bad wine, to  $\gamma$  injury of  $\gamma$  health of  $\gamma$  guests,  $\gamma$  master is liable to an action.

But  $\gamma$  servt. in this case is not liable, for he gives  $\gamma$  wine to be unwholesome. He acts as servt.

And Qu. for  $\gamma$  act is unlawful & wilful in  $\gamma$  servt. & it is a genl. rule yt. when any person has no right to do a given act, shewen soot it at his command, is a wrong-doer as well as  $\gamma$  person commanding. 1 Bl. 430. Wils. 128.

Esq. Dig. 580-8.

If  $\gamma$  servt. does an unlawful act at  $\gamma$  command of  $\gamma$  master, both are liable.

For a servant is bound only to obey such commands of his master as are honest & lawful.

1 Will. 328. 2 Esp. Dig. 580.8. 1 Bl. 420.

But if a servant in obedience to his master's orders becomes instrumental in a wrong of which he himself is ignorant, he is not liable - for he is but an involuntary instl. Ex. Master locks one in a room, & gives the key to his servant Dick. - Dick being ignorant of the fact - (8 Bacc. 568) was not held liable.

But this rule can apply only to such acts as are in themselves harmless - as in the case just supposed. It can't hold in general, if the act is in itself unlawful or if it constitutes a feasible injury. For in the latter case, the law does not regard the intent, when a civil remedy is sought.

2 Bl. R. 892 et ultra. - action of trespass for battery. & in the former the person committing the act is liable civiliter for all its consequences. - 2d. Ex. a servant calls a tree by command of his master, thinking it his master's, he is still liable for the damage - he has a remedy vs. his master.

The acts of a servant which are done with the master's express or implied commands, are not regularly considered as the acts of the master, as where a servant acts with the direction of his master, & not in the discharge of any authority or business with which he was entrusted, or specially intrusted by his master. The master is not liable for injuries thus committed to third persons, or upon contracts thus made. E.g. a servant leaves his work in a field & commits a battery or makes a contract in the master's absence. He has no authority to make.

3 Hall. 252. 8 T. R. 523. 1 Bl. 356.



If a servt. while employed in his master's business, wilfully committed either express or implied, wilfully commits an injury, & servt. is liable. 1 Mod. 503. 1 Mac. 362. 1 K. 141. 1 M. 306. 1 East 126. 1 B. & P. 372. 2 M. 158.

Ex. servt. driving his master's carriage wilfully against his neighbor's carriage. it is same as if he had injured it with a stone or club.

But if a servt. commits this negligence or want of skill, an act, injurious to a third person, & master is liable. Ex. driving a carriage negligently vs. another. The master is liable & so is; Servt. gone on case, & other on 2nd page.

But the master is not an insurer against malicious actions of his servt.

5 T. R. 125. 5 D. 648. 1 B. 331.

2 H. Bl. 342. 1 East 190.

14. another servt. drove his drag vs. a cart & sacks & injured it, negligently, & master is liable.

But where a horse by neglect over a boy & did him much personal injury, master was held liable. 1 B. 339. 1 Mod. 368.

15. a surgeon's student injures a person through want of skill, <sup>negligence or ignorance</sup> & master or surgeon is liable. 1 B. 339. 1 B. 339.

16. if a blacksmith's servt. in shoeing a horse lames him through negligence or want of skill & master is liable. 1 B. 339. 1 B. 339.

17. In 7 years 1794. 5 T. R. 125. Case was lost vs. & master vs. & servt. wilfully driving in carriage vs. & 1 B. 339.

18. This distinction as to master's liability between wilful & negligent wrongs committed by servt. has been but lately settled or fully understood & history of the modern decisions on this subject is as follows. 18.

II. J. C. D. 1795. 2 H. Bl. 442. Treppas vs. master for Master  
servt. negligently driving his carriage vs. plffs. Servt.  
no action & case was proper action. No. 2.

"Treppas" on case 5. 6 2 H. Bl. 440.

III. J. C. D. 1800 - 1 East 106. Treppas vs. master for servt.  
wilfully driving his carriage vs. plffs., reason that  
no action do. lie vs. master because it was the  
wilful act of servt. 1 B. & P. 446.

These are established rules.

These decisions are all correct, & in first & third  
cases no action do. lie vs. master & proper do not  
in fact recover. The reason assigned in first  
that "Treppas was proper action" was wrong.

In second both decision & reason assign-  
ed in it are correct; for witht doubt when master  
is liable for even a forcible injury committed by the  
servt. witht master's actual direction "case" is  
proper action - for master is liable on ground of  
negligence tho proper act. vs. servt. in this  
case is proper. See "Treppas" on case 5. 2 H. Bl. 442.

J. C. D. is liable, however, in "Treppas" for forcible  
wounds of his deputy; for he & his deputy in law constitute  
but one officer, & return of service is always in his  
name, - as every official act by either of them is. 2 Bl. 554.

2 Bl. R. 834. 1 H. Bl. 352.

If a servt. employs in his master's business  
another servt. who by his negligence in performing  
it injures a stranger master is liable, as is also  
last servt. in most cases. - Post - To render master  
liable does not appear correct.

Do it injury were done by one employed by the  
last servt. master is liable. - 1 B. & P. 454; 5 B. R. 411.  
See Long 306.



40. But in y<sup>e</sup> last case, y<sup>e</sup> action lies only vs. y<sup>e</sup> immediate agent or y<sup>e</sup> master. - The intermediate ser<sup>vt</sup>. is not liable, for he does not commit y<sup>e</sup> injury, nor is the master if him who does. 5 T.R. 411.

In genl. (as already stated ante 35) y<sup>e</sup> master is not liable for y<sup>e</sup> wilful torts of his ser<sup>vt</sup>. - Dist. 3 s. 4 & ante. -

But it is otherwise if conceive where y<sup>e</sup> wilful wrong amounts to y<sup>e</sup> violation of a contract between y<sup>e</sup> master & y<sup>e</sup> party injured. - Ex. at ser<sup>vt</sup>. to a blacksmith, wilfully lames a horse in shoeing him. - & tailors boy wilfully spoils a garment in making it. &c.

For in these cases there is an implied promise by y<sup>e</sup> master, yt all necessary skill care & fidelity shall be used in performing y<sup>e</sup> work - 1 H. Bl. 138. & Bl. 158.

Jones on Bailm<sup>t</sup>. 73.4. 3 W. 165.6. 2d. Rd. 910.

I do not however, consider this an exception to y<sup>e</sup> rule yt "a master is not liable for y<sup>e</sup> wilful torts of y<sup>e</sup> ser<sup>vt</sup>." for in these cases y<sup>e</sup> master is not liable for y<sup>e</sup> tort as such, but only on breach of y<sup>e</sup> implied contract. -

The master in such a case is liable on this contract, but he can't if conceive, even in cases of this kind be charged in trespass - ante 35.) If so, he is not liable for ser<sup>vt</sup>'s wilful torts considered as torts, but for a breach of his own contracts. -

Suppose y<sup>e</sup> a breaching y<sup>e</sup> contract y<sup>e</sup> owner brings "Trespass" in common form he can't recover, if "Trespass". -

For he brings "case ex delicto" not alleging the contract.

41. If Sh<sup>ff</sup>. is liable civiliter for y<sup>e</sup> torts & defaults of his under Sh<sup>ff</sup>. in y<sup>e</sup> execution of their office. Ex. neglecting to execute legal process &c. -

It is for arresting of y<sup>e</sup> mistake under a warrant or D<sup>o</sup>. &c.

Young, 32. 2 Bl. 832. 3 Will. 309. 2 F.R. 154. Litch. 187. Kent. 298.

In 3 last case supposed trespass by 3 Sheriff. for 3 Sheriff. & all his substitutes make in law but one officer. 2 Keb. 252.

And for a mere neglect of duty 3 Sheriff is only liable at C. L. - 3 under Sheriff. is not liable. - i.e. to 3 party aggrieved. For in such the action is not for a breach of official duty only, & 3 under Sheriff. not being a known public officer, is not liable in his official character, & does not act in his own name. Esp. Dig. 603-13.

For positive tort 3 under Sheriff. is liable. Ex. Em. 42. concerning an execution, for voluntary escape - for arresting a wrong person &c.

In these cases he is sued not as an officer, but as a wrong-doer.

The Sheriff. is also liable for even 3 wilful torts of his deputy, if they include breach of official duty.

Ex. concerning an execution - for a voluntary escape &c.

In County. both are liable in all 3 above cases, for 3 deputy is here a known public officer, & acts in his own name.

4 Postmaster is not liable for 3 defaults of his subordinate officers. He is himself a public servt. vide ante 27. is an agent of Government. 2 Bl. 648. Earth. 487. Term. R. 100. Corp. 754. 764. Lath. 19. 256. 624. "Boilant." 66-7. and as such liable to an injudicious selection of subordinate servts. only to the public.



43. But a post-master is liable for his own actual defaults. He is a deputy post-master for his-  
3 Mills. 443. Esp. Dig. 623. Coops. 765. 2 Blk. R. 906.

In such cases he is liable as any other individual - i.e. for his own torts. See Bailment. "gent. & pack. app't." will lie vs. him for money illegally received to his own use.

The ~~contract~~ master is bound by contracts made for him, by a servant, whenever the latter, in making a contract, acts within the scope of an authority delegated to him by the master. In the case of a servant, if he act for the master? (ante 24, 30)

The authority may be genl. or special; express or implied. - (24th. 553. 653.) Combs. 350. 820. 551.  
2 Penn. 549, 640. 5 Mod. 358. Chit. 24-7. 1 Bl. 437 or 558. 1 Phos. 98.  
3 Bl. 757.

44. A genl. authority to contract, if one wh. is not confined to any individual contract, but extends to all contracts genl. or to all of a certain kind.

Ex. 98. employs a servant, to purchase necessaries genl. for his family on credit.

A special authority is confined to one or more individual, specific transactions. - Ex. 98. emp. 93. to buy a horse for him on credit.

1 Bl. 430. 1 Rose. on cont. 131-2.

A genl. authority may be implied from the master's usual or frequent practice. 1 Bl. 430.

44. If he usually permit a servant, to purchase necessaries on credit. 3 Bolk. 234. 1 Phos. 95.  
See "Contracts" 115.

A special authority may also be implied. - Ex. 98. a master stands by & hears his servant, contract for him. - 1 Rose. 131. 2.

If a master has made it a practice to send his servant for necessities, <sup>with</sup> money, & has permitted a servant to trade for him in no other way, he is not liable for what a servant may buy upon trust. There is then no implied order to a seller to trust a servant. & no implied authority to the servant to purchase on trust. 1 B. Com. 430.

Decus - if a master has usually & frequently permitted him to trade on trust. (1 B. Com. 430) - then he has given a servant credit with a seller, as a case might be, with the public.

And if a master has once paid for what a servant has bought for him on credit, with the express disapprobation, he will be answerable for a subsequent purchase made by the same servant from the same tradesman, or vendor till he gives the tradesman an express order to the contrary. For a payment will be equivalent to a direction to trust a servant in future. 1 B. Com. 430. Ch. n.

And if a servant with any prior authority 46. genl. or special, buys goods for his master, which come to a master's use, he is liable, for he is bound by his assent subsequent. - 3 Ch. 235.

Chit. on B. Com. 26

Com. 430. 3 Kebl. 625.

Suppose in the last case a master had sent a servant with money, & yet the latter had kept it & bought on trust, there being no prior authority in a servant to trade on trust, & a master being ignorant yet a purchase was made on credit, would a master be liable, because the goods had come to his use? Doubtful. 2 L. R. 224. 3 Ch. 235. 3 D. R. 760 1 Com. c. 221. 2 L. R. 224. 5 D. R. 214. 10 M. D. 110. 3 Kebl. 625.

There is no assent implied subsequent in this case, & if so, a master I conclude will be liable



for them is no primary authority. - Peak. R. 48.

On this case, & vendor trusts  
y servt. at his peril. -

But if y credit is obtained by y master's au-  
thority, & y servt. embarks y money<sup>at</sup> given him to  
pay y debt, y master must bear y loss. - 20 R. 234.  
1 Com. & C. 221. 5 Ex. 40.

In this case y master is indebted on a contract  
made by his authority, & y vendor is not liable to  
y act or y embarkment. The master ergo takes  
y risk of embarkment.

47. But tho. y master has committed his servt.  
to have for him on trust, he may discharge  
himself in justice by forbidding y tradesman to trust  
y servt. again on his account; but not for deed  
known to himself & servt. only, nor for a time, by  
a private dissolution of y relation; & in all cases  
of this kind, y prohibition or dissolution shd. be as  
public, as y credit before given by y master to  
servt. 3 D.R. 760-1. 10 & 11 Mod. 109. 12 & 350.

Chit. & Bhs. 25-7. Peak. R. 32, 154.

And if a servt. in selling property which he is  
authorized to sell by y master, make a warranty,  
y master is bound by it, in y authority was express-  
ly restrained. - 2 Ex. 40. 3 D.R. 197. 3 D.R. 757. 10 & 11 Mod. 109.  
2 Ex. 40. 111. 12 & 13 Mod. 109. 12 & 350.

And even when y servt. acts within y scope of  
genl. authority, even an express restriction not  
made public, & not known to y purchaser,  
will not exonerate y master. - Ex. 40. 111.  
A servt. at a livery stable & a horse, with  
warranty, when a genl. authority & credit are given  
to y servt. 3 D.R. 760-1. 10 & 11 Mod. 109.

48. Sup. if y servt. were only a special agent, then  
not. he no genl. credit given him with y public

is not to rely on any warranty in the 5 Vol. & 3  
purchaser.

The above distinction between effect of a genl. & special authority, applies in genl. to all <sup>contracts</sup> made by privts. S.D.R. 760-2.

Edco Due. as to 3 copy of Southern vs. ~~the~~  
Geo. J. 469. 2 Rep. 143. New. 560. 2 Pac. 580 (Esp. 629. 632.  
2 Roll. R. S.) For 3 writ. was, not expressly re-  
sented from warranting, & he, <sup>master,</sup> ~~was~~ willfully concealed  
& defects, wh. in law is a warranty.

Dec. as to 3 fraudulent sale to an un- 49.  
sound horse by 3 servt. at a fair, 3 master  
not having directed him to sell to any partic-  
ular individual. In such case it has been  
helden yt no action lies vs. 3 master. #

1 Roll 95. Pph. 142. 7 Bxcs. 60. 290. 555.

2<sup>d</sup> For conceit of 3 - compounds is a variety.

# It seems however agreed, yt. if  $\gamma$  master directed  $\gamma$  servt. to sell to  $\gamma$ . &  $\gamma$  sale was to him; yt  $\gamma$  master wd. be liable.

See 3 copies cited in 3 text.

How can this vary of case? Whether he directly  
y servt. to cheat J<sup>r</sup>. or any one <sup>else</sup> whom he may  
meet?

According to 2 genl. rule (ante 17.) if a merchant's clerk sells goods for his master, & warrants them to be sound, & master is bound by the warranty. - So in other similar cases. -

49. H. 177. 33 Buc. 560. Ol. 11 K. 282:9 Q<sup>1</sup><sub>1</sub> 65 J. 29 H. 257.

The servt. is regularly not liable on  $\gamma$  contracts wh. he makes for  $\gamma$  master. But he may subject himself personally even in transacting  $\gamma$  master's business, by an express agreement, or warranty in his own name. Ex. 4.



he made a warranty on his own credit. 1844 95.

3 Dec. 562.

And undoubtedly if z servt. make in z mag-  
ter's name, a contract wh. he has no authority to  
 make, & by wh. his master is not bound, he  
 must be legally liable. in willk. 2 Down. 127.

Could he be subjected at this season  
to contract insubidia? the reason of variance.

Might he not be subjected, as  
 3 case might be, in an action of deceit or "fraud" and recover  
 or in any other action (adapted to 3 case) in tort?

One's wife, child, relation, or friend, acting  
for him, under a genl. or special authority, is his  
servt. within  $\gamma$  rules wh. treating acts  $\gamma$  & ser-  
vant as  $\gamma$  act<sup>r</sup> of  $\gamma$  master). 1836. 330.

51. The master is not liable for expenses incurred by courts, sickness, &c. &c. 2 Esp. 72. 2 B. 304. 289. (Esp. Dig. 270. Burrows v. Wiltshire, 4 B. 304. contra) - But the master may be bound by express contract.

This rule does not hold in Court, in the case of apprentices, or is it not otherwise here with respect to them?

This rule does not hold in Cant. as to slaves. This is a case of trust where slavery is legalized.

4<sup>th</sup> case of apprentices however, & master usually contributes to bear such expenses.

How far  $\gamma$  servt. is liable for his acts and defaults to strangers & to his master.

Genl. Rule. Those acts of  $\gamma$  servt. wh. are not done by  $\gamma$  master's command, express, or implied, are not in law  $\gamma$  acts of  $\gamma$  master; ante (36.5) For these cases  $\gamma$  servt. & not  $\gamma$  master is answerable.

In these cases he does not act as servt.

And  $\gamma$  last rule applies regularly to all cases 52. in wh.  $\gamma$  acts of  $\gamma$  servt. are not in  $\gamma$  discharge of any business or authority with wh.  $\gamma$  master has intrusted him, as in  $\gamma$  case of wilful torts of  $\gamma$  servt.

Corp. 406, 106. 431 3 Bac. 562.  
Exp. 2503. Plath. 18. 175.

In some cases strangers injured by  $\gamma$  acts of  $\gamma$  servt. may have their remedy either vs the master or  $\gamma$  servt. The genl. rule seems to be, yet if  $\gamma$  servt. in performance of  $\gamma$  master's business, does an injury to another thro' negligence, ignorance, or want of skill,  $\gamma$  servt. himself (as well as  $\gamma$  master) is liable to  $\gamma$  party injured. - 59. R. 411. 125.

Co. 5, 86. 2nd. Rep. 220. 2tra. 1082. 175. 224.

Sliter, if  $\gamma$  transaction in wh.  $\gamma$  servt. 53. was engaged for  $\gamma$  master, was founded on contract between  $\gamma$  master & stranger (38-7.) - Ex. Servt. neg. ligently drives master's carriage vs. another's & breaks it, or overthrow persons,  $\gamma$  servt. as well as the master is liable;  $\gamma$  party injured has a right to consider  $\gamma$  servt. as  $\gamma$  only author of  $\gamma$  injury, & is not bound to inquire into  $\gamma$  private relation.

action in  $\gamma$  case, vs.  $\gamma$  master "case" vs.  $\gamma$  servt. "trespass".



any I conceive, if a transaction is founded on contract (ante 367.) In such case a master only is liable to a party injured - he is liable on a condition expressed or implied, for a act of a servant being here a act of a master in a performance of his business, & in a execution of his contract.

Ex. Blacksmith's servt. lames a horse in shoeing him. tho negligence. A tailor's servt. makes a garment unsuitably. - In both cases a contract of bailment is violated in legal contemplation, by the master. - Indeed a master only can in legal contemplation violate his own contracts. Corp. 406. Esp. 586. Chalk. 603. 1036. 481.

54. There is an exception however to a last rule; for a master of a ship, as well as a owner, is liable to a freighter for damage occasioned in his negligence. tho a contract of freightage be made between a owner & freighter; & because a master it is so. is considered an officer. But what then?

6 M. 128. Bayl. 220. Lalk. 440. Leath. 38. 1 Vent. 170.  
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The rule I conceive is founded in convenience & forms only an exception to a genl. rule. The owners are frequently unknown - Besides is not a bill of lading always signed by a master?

And if any servt. commit a wilful tort, he is liable, I conceive in all cases, to a party injured, even tho a transaction was founded on contract (ante) as in case of a smith's servt. wilfully laming a horse, for a act is not in performance of a thing contracted to be done, it is not in pursuance of a servt. authority but a distinct wrong. If a master himself had done it, a owner I think might waive a contract & sue him in trespass. 1 East. 106.

55. A public agent contracting or acting as such, is not personally liable, - as so. ante 27.

Upon this principle I doubt if money had been  
-ly not vs. an officer of revenue for an overpay-  
-nt. made by mistake; because he acts for public  
-ic in exercise of his office. - application  
must be made to government. Corp. 59.

But an action will lie vs. a public of-  
-icer for money extorted or illegally received to  
his own use. - Corp. 182. - goes to that, he acts for  
himself, & as a private wrong-doer.

If an atty. knowing he is being witness to a  
release from J. to B. brings an action for J. vs. B.  
he is not liable to B. - He acts as a serot. &  
is not obliged to judge over his client. -

But where a atty. for a J. after a non-  
suit entered judgment vs. a Def. &c. he was holden  
liable to a Def. Epps. 618. Hutt. 125. This is a wilful  
wrong of a atty.

The serot. is liable to his master for all wilful  
wrongs & all negligence by which his master is injured.

Ex. A serot. entrusted with a care of a master's  
cattle suffers them to die for want of care.

1 Mood. 466. 2 Bac. 566.

If a merchant's serot. loses a master's goods  
before a duty is paid, & they become forfeited in  
consequence of a act, a serot. is liable.

2 Bac. 566. 10 Mod. 169. Cro. 265.

No action lies vs. a serot. for a mere breach of  
his master's orders, if no damage is sustained.  
Correction is a suff. remedy. - No for ill man-  
-ers.

But if a serot. disobeys or neglects to per-  
form any of his lawful commands of his master,



& 3 latter in consequence of 7 disobedience, or neglect, supplants any damage, an action lies vs. 3 servt.  
1 Sidw. 298. 3 Bac. 564.

It is when there is a neglect of duty, tho' no express command, an action lies vs. 3 servt. if 3 master sustains any damage in consequence thereof. Ex. 18thly neglecting clients cause.  
see Innes's on 3 case. 1 Sid. 298. 1 Lev. 188. 2 Keb. 88.  
2 Wils. 325. 4 Burr. 2050. 40b. 617.

58. The servt. undertakes, regularly, only for fidelity & diligence, & not for strength or skill. He is liable, ergo, in genl. for such loss only as is occasioned by want of diligence & fidelity.

Hence he is genl. not liable for a loss of the master's goods by Robbers. For ordinary care and fidelity can't guard vs. it. 3 Bac. 564-109 Mod. 109. 4 Co. 84.  
see "Bailement" 49.

And in genl. 3 servt. is not liable for losses occasioned by those accidents, vs. wh. ordinary diligence & fidelity are not a sufft. guard.  
3 Bac. 564. 109 Mod. 109.

But 3 servt. is liable over to 3 master whenever 3 master has been subjected to damages for injuries done to third persons, by 3 misconduct or culpable negligence of 3 servt.  
2 Wils. 1083. 109 Mod. 109.

59. The last rule, however, supposes 3 master not to have been actually a party to 3 wrong committed by 3 servt. If he was, he has no claim on 3 servt. for recouping joint wrong-doers. There is no contribution & no remedy of any kind.

Ex. The master commands 3 servt. to commit a trespass, & is subject to it. 8 T.R. 186. Kio. 116.  
see "Innes's" - 164.

How far servants are punishable for emberr-  
ling their Masters Goods.  
(vide "Larceny" in Grim. Law.)

### Of a Masters authority over Servants.

The Master has a genl. right to chastise  
his servants for any breach or neglect of duty.  
As for disobedience, insolence, negligence &c.  
1 Hawk. III. <sup>10</sup> 2 Keb. 625. 1 Inst. 70. 10 Mod. 125. 7. 10 Mod. 428. 10 Mod. 179.

But this rule is not universal. sup. 2 Keb. 529.

But a correction must be reasonable; secus 60.  
a master is not justified, 2 Mod. 157. 8 Mod. 720.  
vide "Parent & Child" 106-7 - he may be liable  
to a servant, & as a case may be, to a public  
prosecution. - The first rule, however, does not  
apply to all servants. - Those of the fifth class  
are genly. not liable to correction.

And it appears to me yt this right of correc-  
tion extends to no other servants. than such as  
belong as servants to a masters family.

For a right is substantially the same as  
that of correcting ones children; & as I con-  
ceive, supposes a servant to be under a pers-  
onal domestic government of a master. 1 Mod. 428  
11 Mod. 168

The master undoubtedly has a right to chap. 61.  
tize his slave for a reasonable cause, & also  
his apprentices, & menial servants.

The master may correct a slave or appren-  
tice of any age. But if he beat any other  
servant of full age he is not justified, & the



servt. man be discharged by proper au-  
thority.

The last case & rule is the same, if the beating is by the master's wife.

A master can't justify a wounding by force i.e. he can't justify it by virtue of his right of correction, as master; for he must chastise moderately, or reasonably if at all.

If then a servt. sue a master for assault & battery & wounding -- he can be justified as master as to the assault & battery only, & shall plead not guilty as to the wounding; or show some other sufft. cause, as necessity, self-defence. 2 Mod. 157. (1 Bl. 428. Tit. 168.)

2 Mod. 120. 218330.

9 Co. 75. a

62. The master must state in his justification, the retainer i.e. the contract, the place where, & the business in which -- these being issuable matters.

The master can't delegate his right of correction, for the authority is personal. -- If indeed a master put his servt. to school, the school-master may correct him for a reasonable cause. But the school-master's authority is not strictly delegated by the master. The school-master's right arises from breach of duty to himself, & not to the master, & is confirmed by law. L. Ray. 62. 210

2 Mod. 157. 9 Co. 75. a. Stra. 953. Cro. 550.

If a master in correcting a servt. kill him, he is guilty of excusable homicide, manslaughter, or murder, according to the circumstances of the case. 2 Mod. 287. 1 Hawk. 111. Keat. 65

3 Bac. 567. 1 Hale. 414. 1784. Just. of cr. law 269.

Of the Master's Remedy vs. Strangers for 63.  
Injuries done to him in relation to his servants.

An action lies in favour of a master vs. any one who entices away his servant. The action is laid with a "per quod &c." (ante 19.20.)

If a servant is taken away with force "breve" with a "per quod" is a proper form to action. If no force, a action is strictly "cease" - "breve" is not in law. (ante 20. post 68.) Co. 56.  
6 Mod. 182. 2 La. Rep. 252. 107. 1 Mod. 569. 107. 180.

So if a journeyman employed to work. If a master with enticement, leave a master with license or just cause is retained by another, latter knowing of former retainer, an action for loss of service lies vs. latter.

5 Bac. 567. 10. 103. 2 Les. 52.

But an indictment will not lie for enticing, it is a private injury. 10 Mod. 191.

20. 116.

But by a Stat. of 1702, a person enticing an apprentice, whether bound by indenture or otherwise, forfeits to a master, by way of penalty, a sum not exceeding £100. - This does not oust a master's right to recover damages for loss of service. 4. Cont. B. 2. p. 118.

If a servant is beaten by a stranger, he alone may have an action for battery. If a loss of service is occasioned by it, a master may also have his action; for a servant is injured in his person, & a master by loss of his labour - If recovery by one is no bar to the other's action - for their rights & injuries are distinct. 5 Bac. 568. 9 Co. 117. 10 Co. 151.



2 Bulst. 198. 1 Phil. 138. see "Ex. 156. "Dun. & White" 197.

65. The master in  $\gamma$  last case must declare with  
a "pro quod" "Sec. & cant recover, if there has been  
an loss of service. 3 Bac. 508. Cro. J. 578. - 2 Roll  
508. 2 Blk. 429. 9 Geo. 113. Par. & Ch. 110.  
\*This is  $\gamma$  very gist of  $\gamma$  action.

If minor child is a servt. within these rules & an  
adult child may be. "Dun. & White" 109. & if when  
 $\gamma$  child of full age has not been emancipated.  
Hence  $\gamma$  action for procuring such compensation  
with  $\gamma$  pro quod "Sec. - (see Par. & Ch. 110.)

If one beat another's servt. to such a de-  
gree, yt he dies,  $\gamma$  master has in Eng. no rem-  
edy. The private injury is merged in  $\gamma$  pub-  
lic. 3 Bac. 508. 11 Geo. 89. 90. 2 Roll 508. Ro. 339.

66. If a surgeon employed to cure a servant's wound,  
unintentionally injure it by improper treatment,  
so yt  $\gamma$  master loses his service, in consequence  
of  $\gamma$  treatment, an action lies by  $\gamma$  master vs.  
 $\gamma$  surgeon. - 3 Bac. 508. 1 Roll R. 124. 2 Bul. 332.

Suppose  $\gamma$  injury done thro negligence or  
want of skill, wd.  $\gamma$  action lie for  $\gamma$  master?  
For  $\gamma$  servt. it certainly wd. - Exp. 601. La. R. 214.  
(2 Bull. 332) 2 Phil. 339. 1 Roll. 90. 8 East. 338.

see "Drops. on  $\gamma$  case" 8.

In  $\gamma$  case of a servt. enticed away or leaving  
his master with license, & retained by another  
person knowing th  $\gamma$  former retainer (ante 53-4.) a  
recovery had & full satisfaction by  $\gamma$  master vs.  
 $\gamma$  servt. is a bar to  $\gamma$  master's action vs.  $\gamma$   
stranger who enticed or retained  $\gamma$  servt., for  $\gamma$   
master can have but one satisfaction. 3 Burr. 1348.

1 Bl. R. 387. 1 Bl. 387. 3 Dec. 1845.

Qu. Whether a recovery with a satisfaction is a bar in 3 last case. 3 Bl. 1353-4. Yelv. 68. 5 Bac. 183.

4 Bac. 116. - 2 Inst. 8. Buty. 16. 302.

corro boot. I think they are not considered as joint-tort-feasors

What acts 3 Master or Serv. may justify in each others defence.

The master may maintain, i.e. abet & assist) in an action vs. a stranger, & it is not maintenance. 1 Bl. 429. 2 Roll. 113.

A serv. may clearly justify an assault in defence of his master - It is a part of his duty. 3 Bac. 508. 1 Bl. 428. 2 Roll 546. Falk. 407.

This right grows out of 3 relation of master & serv., & therefore he can't justify an assault in defence of 3 master's son, not being serv. to him. 3 Bac. 508.

3 Defence of 3 master's goods.  
3 Bac. 508.

Qu. If they are in 3 servts. possession. (I think in this case he may justify force. J.G.)

Whether a master can justify an "act. in defence of 3 servt. is questioned, because he may have an action on his of service. 3 Bac. 508. 2 Inst. 6. 11 Inst. 40. 1 Bl. 429, Lacey on W. 124.5. I think this no reason J.G.

But Qu. Is this a proper reason? The opinions are contradictory. The master's interest seems sufficient to justify him - Besides it seems to be his duty to protect his servts. (I think 3 right reciprocal J.G.)



94 servt. can't avoid a deed obtained from him  
by duress\* of his master; The relation is not suffic-  
iently intimate - 1 Roll. 687. s Bac. 568.

But Eq. might probably interpose in  
his favour as for fraud or unfairness.

\* He can by duress of himself.

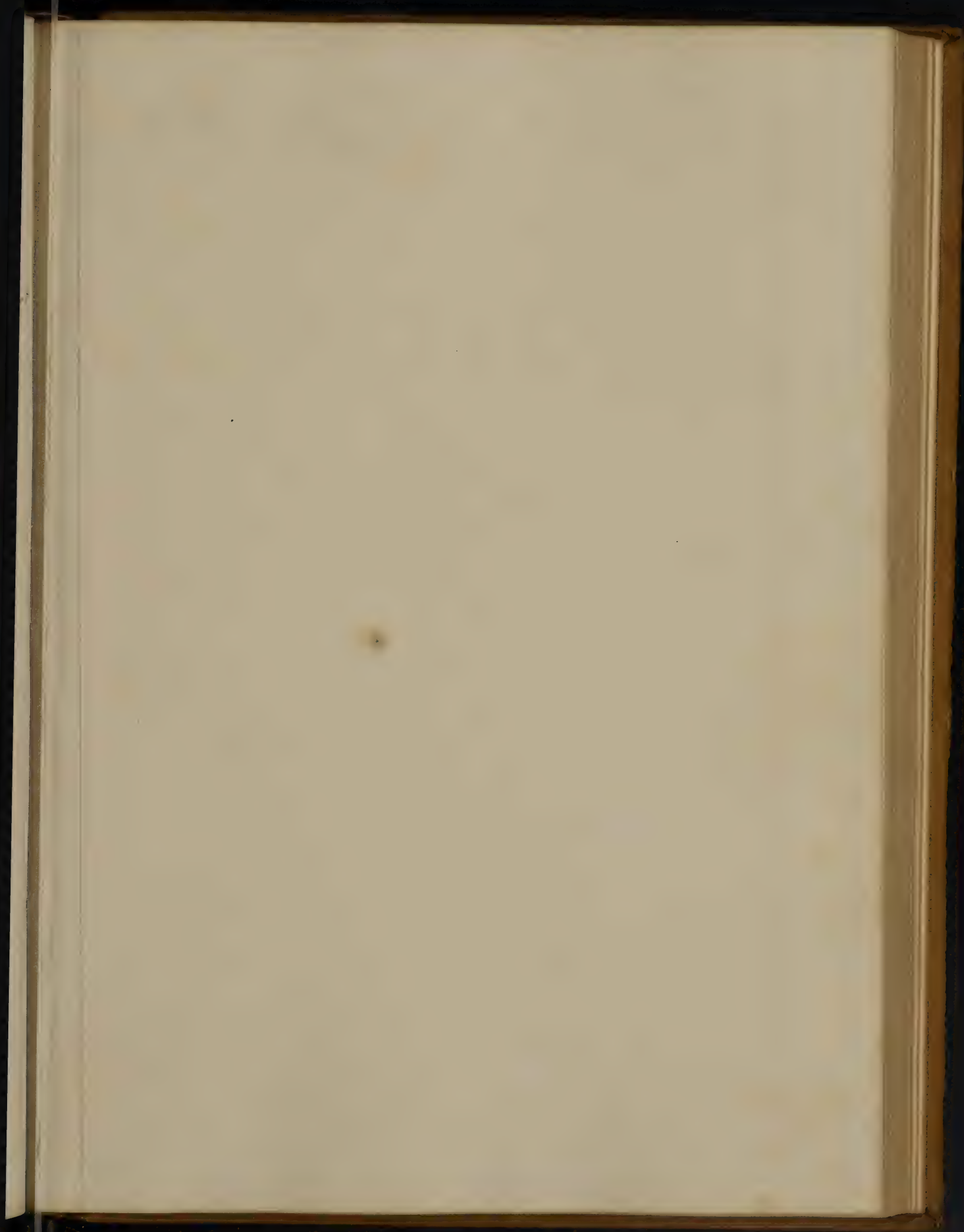
(ante 32 For where one of two innocent persons must  
suffer, he who enabled & wrong over to do & wrong  
must bear it, - hence & master must suffer for  
tempting him.)

Finis "Master & Servt."

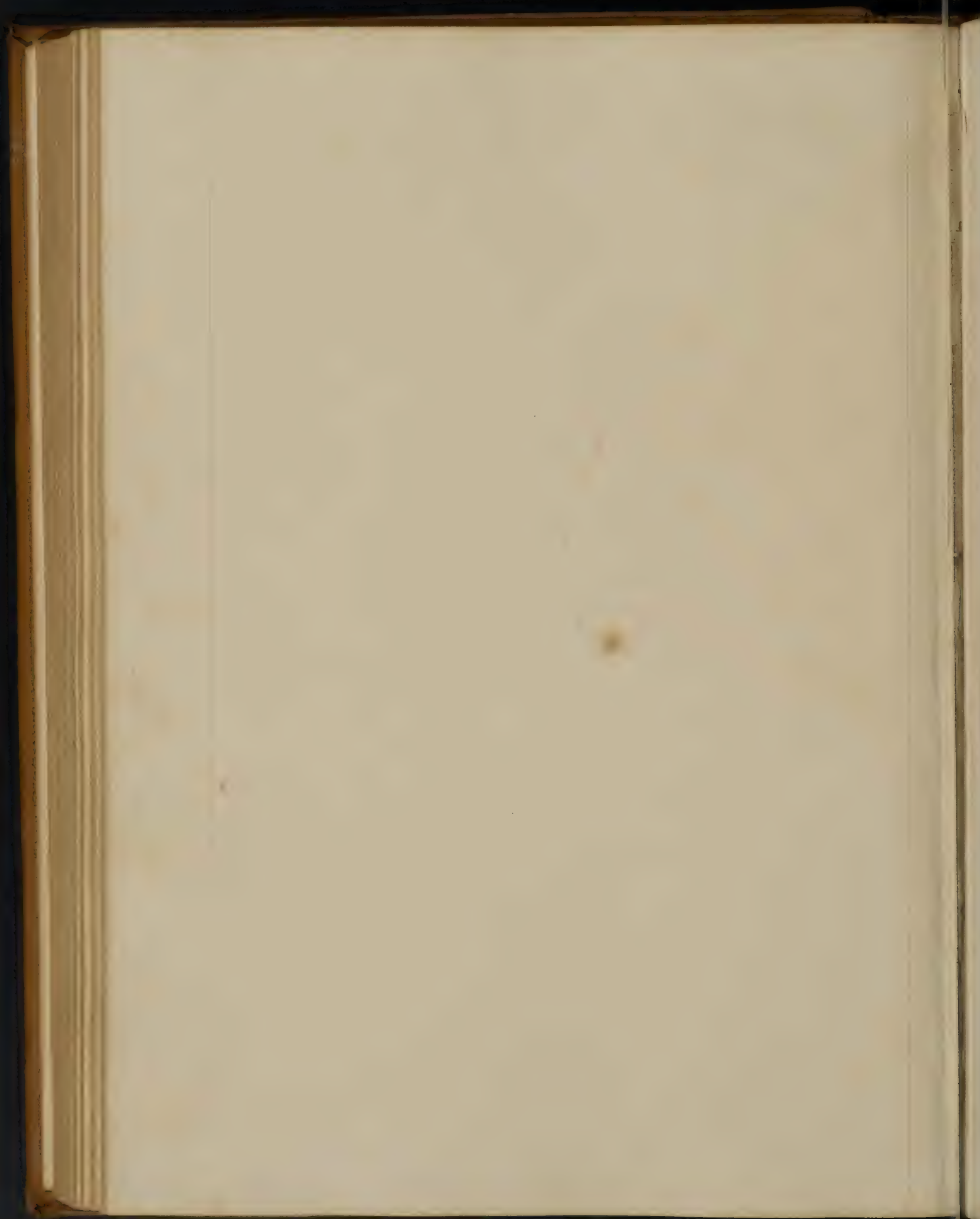
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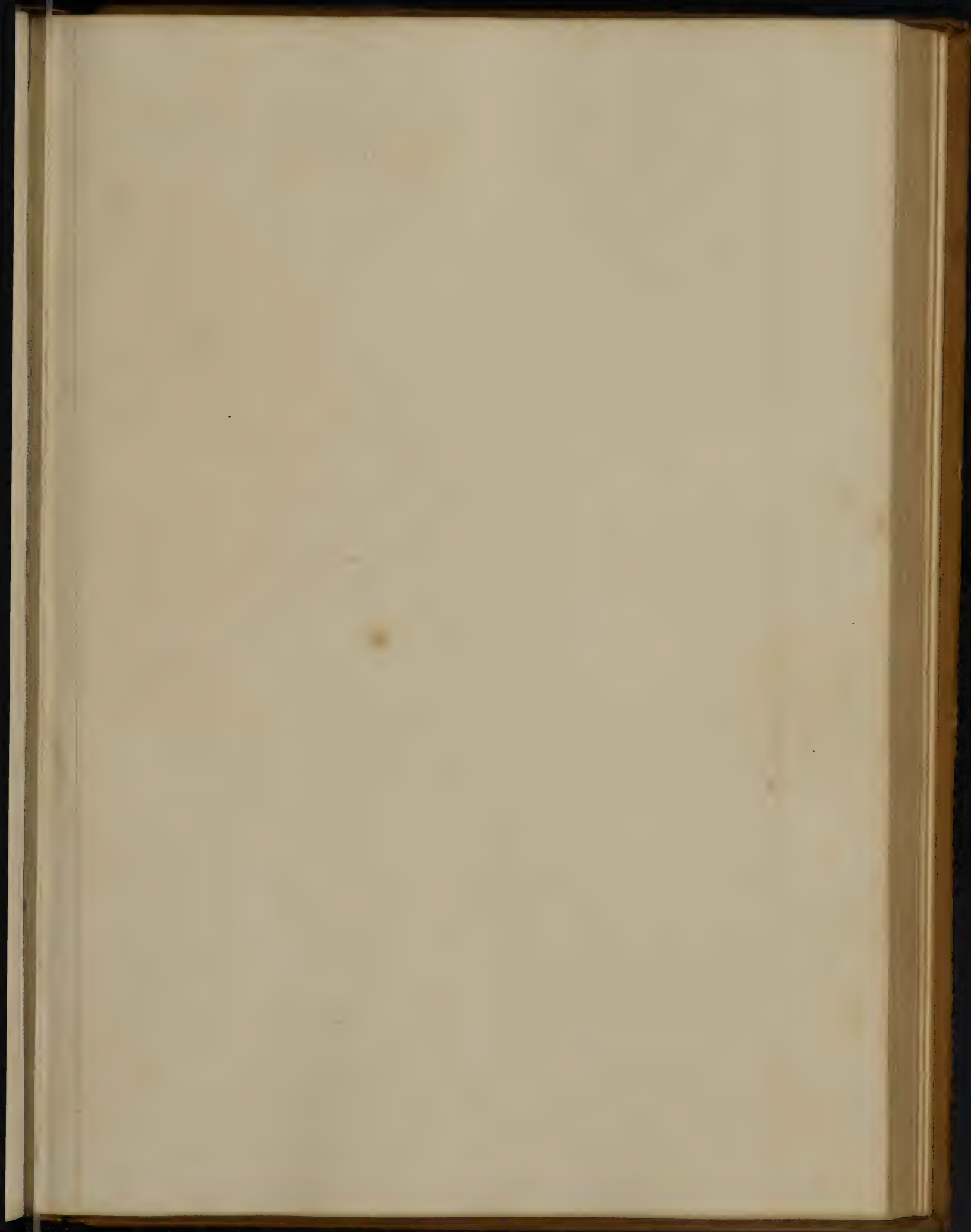
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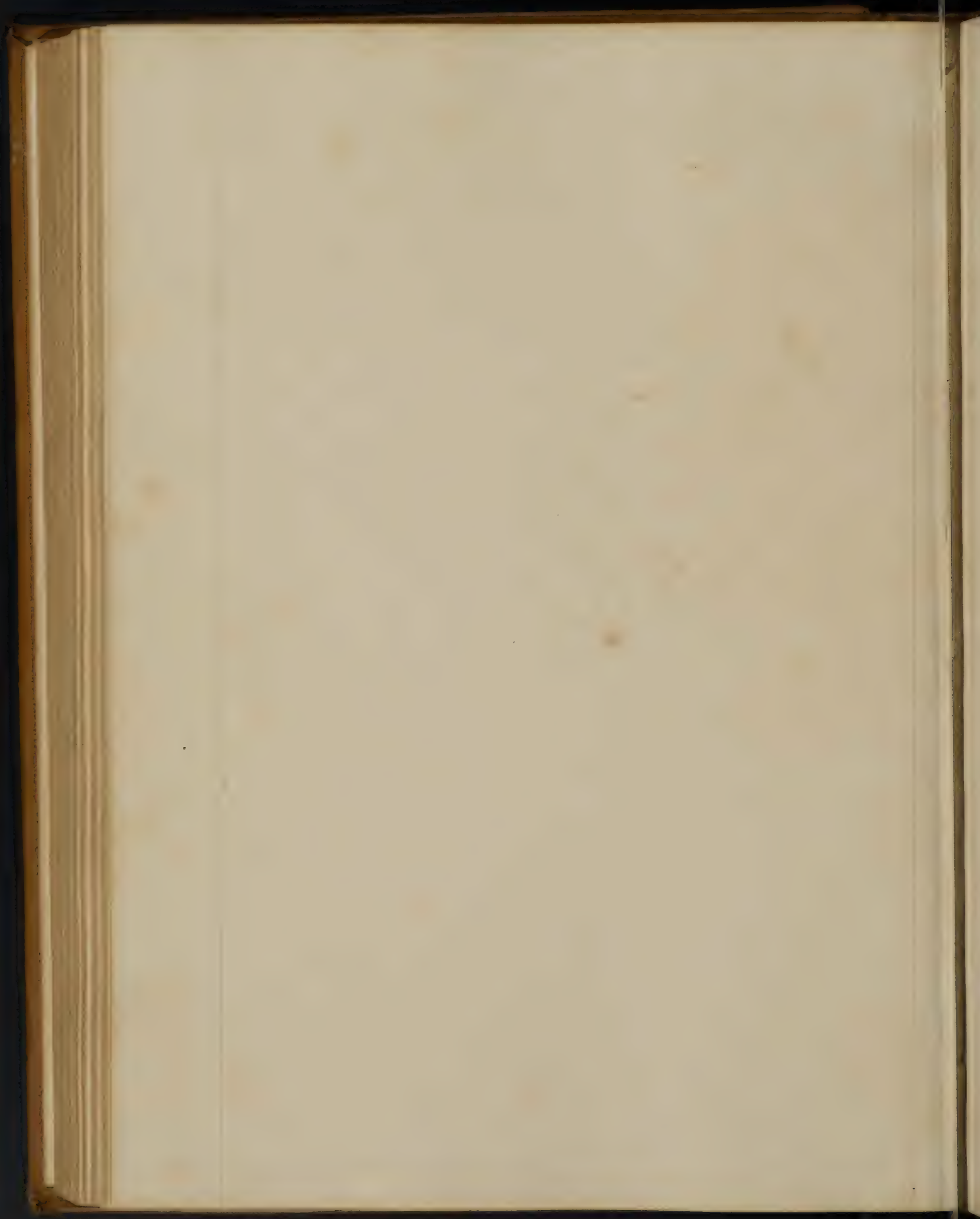


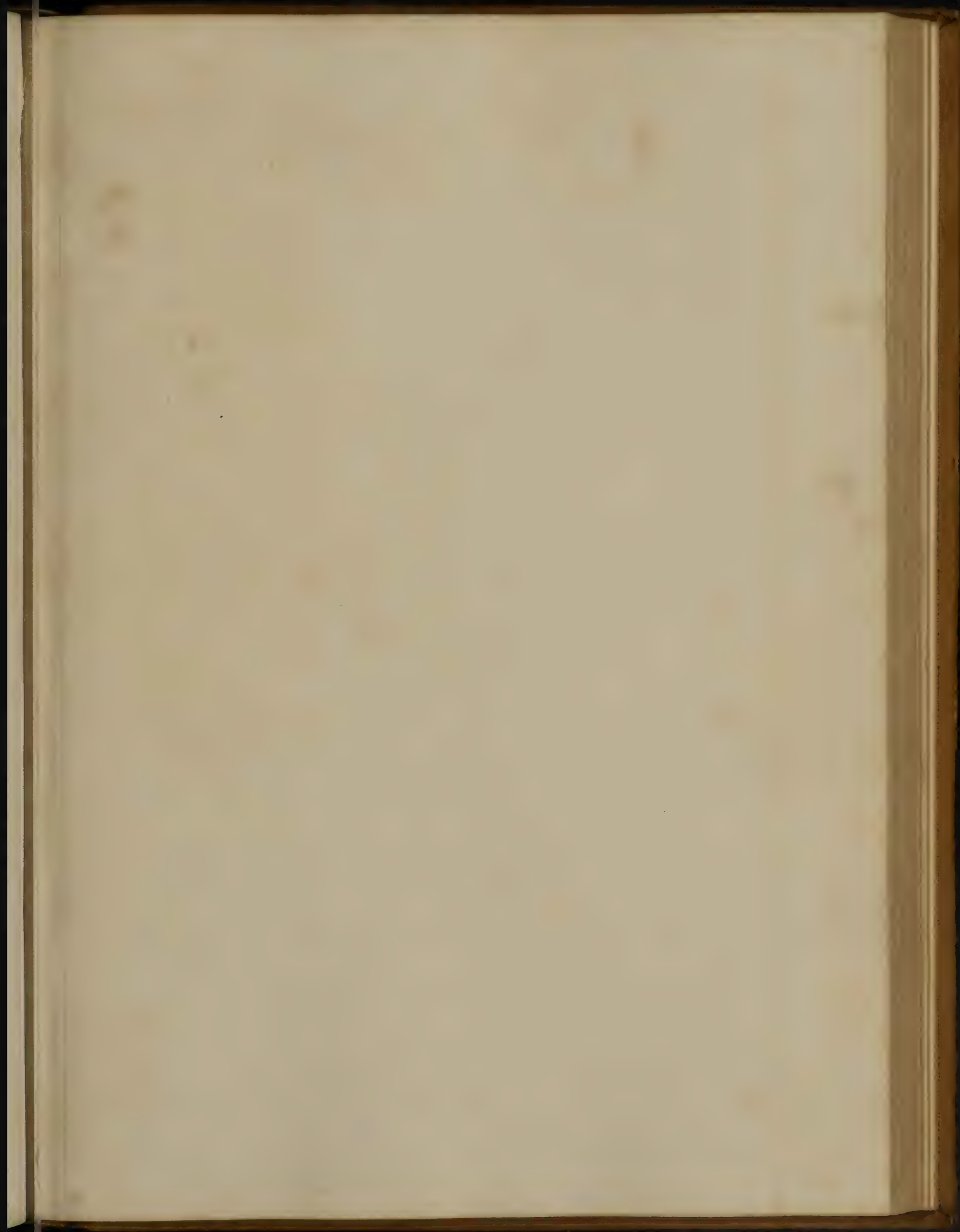
















# Contracts.

Co. 1.

(April 80.)

A Contract as known to 3 States is an agreement between two or more parties upon sufficient consideration to do or not to do a particular thing.

2 Bl. 442.

Pollock defines it to be "a transaction in which each party comes under an obligation to the other or each acquiring a right to that which is promised by the other".

Pollock on Torts. 6 & 7.

The term includes as well agreement, executed (e.g. gift, grant, lease &c.) as those which are executory (e.g. contracts to promise &c.) there being in both a consent of 3 parties, to an agreement, respecting some property or right which is subject of 3 stipulation.

Pollock on Torts. 7.

The Requisites to a Contract are 1<sup>st</sup> Parties. 2<sup>d</sup> Mutual consent to some stipulation. 3<sup>d</sup> An obligation to be created or dissolved.

4<sup>th</sup> If 3 parties is who may bind themselves by their assent.

The assent of parties is of essence of every contract - without it there can be no agreement. & if conveyed no obligation created or dissolved.

1020. 9.

Hence a person non compos mentis, or an idiot or lunatic can't regularly make a binding contract. - He has no understanding, & ergo in legal judgment, no will.



In Engl. contracts not of record made by such persons are actually void (Row. 1 & 3 better opinion he says is, *non est factum*) may be pleaded to them. 2 Roll 728. 4 Co. 123b. 1 Bos. 112. 7 Bar. 87.

They seem to be void as to some intents, but not as to all.

They & surrender of a particular estate, by a person non compos. does not destroy a contingent remainder depending upon it. 1 Aff. 286. 301. Valt. 576. Ld. R. 316. 1 Ld. 284. Co. Th. 211 & 235. Strictly void as to this purpose. Com. b. 438. 439.

But Ven. Whether *non est factum* can be pleaded to such persons &c. Lath. 575. 4 Co. 127. Esp. 229.

The opinions are contradictory but it is not the deed may still be void. 13 Tra. 1103. 3 Bul. 119.

3. But persons insane are competent to receive property by a derivative title. Ex. by gift, exchange &c. as well as by assent, there being (it is so,) a presumed assent to what is in common presumption beneficial to 3 party.

Would it not be more proper to say, that in such cases, 3 Law dispenses with 3 assent required in other persons?

And if 3 insane person recovers his understanding & then agrees to 3 purchase, his assent becomes binding, but if he dies during his insanity, or having recovered his understanding, dies without assenting to it, his heirs may avoid it. (1 Bos. 18. Co. Ld. 2. 2 Kent. 229.) or affirm it. his contracts are absolutely void - his purchases but voidable.

But as to contracts made by a person "non compos" to alien his prop<sup>y</sup> or to create any obligation upon himself, there is no such presumed assent. & he is a legal assent dissipated with (1 Dow. 14.) These fall within 3 genl. rule, & their contracts are void.

As to these however, it appears 4. to be a rule of 3 Com. L. & 3 person non compos. can't himself on recovering his understanding, take advantage of his former incapacity, no man of full age shall disable his own person or "stultify himself" 1 Dow. 14. 26. Cro. E. 398. 622. 3 Co. 123. 1 Lom. 31. 3 Bac. 17. Lit. 305. & qu - To this intent they are not void.

The authority on this point are not settled, see 1 Bul. m. pri. 192. 1 Str. 1104. 2 Kent. 198.

This rule is founded on 3 supposed reason of policy; to prevent fraud, by pretending insanity. 1 Dow. 20. 3 Bac. 87. 4 Co. 123

Rule in Com. L. that one may allege his own prior insanity. 3 Day. 90 & even at Com. L. after 3 death of such person, his heirs or execs. might avoid his contracts of this description. (3 Bac. 87. 4 Co. 123-5. Fitzh. nat. brev. 202. Cro. E. 398.

There are also two modes in wh. such contracts may 5. be avoided during his life by 3 Eng. L.

1<sup>st</sup> After officer found (i.e. a verdict finding some fact) upon 3 writ "de evicta inguineudo - in lunaticis &c." The king as parens patriae may by some officer during 3 parties life time, avoid all alienating gifts & other acts in pais (i.e.) not of record, of 3 idiot during his incapacity. This office found has relation to 3 commencement of the disability. 1 Dow. 23. 57. 1 Jun. 40. 4 Co. 126. b. & Co. 170. 3 Bac. 88. 9. & thus contracts made before officer found



are avoided.

2<sup>d</sup>. If suit may be brought in Chancery for the same purpose by 3 <sup>rd</sup> party, or by committee of 3 party, & 3 more comp. p<sup>ts</sup>. not be a party. (1 Bos. 267. 2 Vent. 414. 3 P.W. 105. 11. 3 Attk. 170.

1 Eq. cas. abt. 279) for he may not stultify himself. see 1 Eq. cas. abt. 279, 2 P.W. 105. 11.

But if a suit in Chancery is brought in the half of a lunatic, to compel performance of a contract made with him while sane, he ought to be made a party; for 3 suit is not brought to stultify him, or to take advantage of his incapacity; but to enforce his claim; & committee is but his bailiff. 1 Bos. 283. 1 Green. cas. 153.

If a lunatic makes a contract during a lucid interval, he & his representatives are bound by it. 1 Bos. 28. 3 Bac. 87. 9. Eq. 203. 9. Co. 125. a. 2 Vern. 412. 4.

6. Lunatics & Idiots are bound like other persons by acts & contracts if record. i.e. fines or recovery not avoidable by their being or in any other way. For no averment can be admitted vs. 3 record. (1 Bos. 21. 2. 4. Co. 124. Co. L. 247. 10 Co. 82. 3 Bac. 88.)

Note, an idiot is a natural fool, a person who has had no understanding from nativity. 1 Bl. 303. 3 Bac. 88. It is <sup>not</sup> p<sup>ro</sup>ved that one who has any understanding; as one who can tell his age, his parents, & days of 3 week or count 20 is not an idiot. id. 203.

A Lunatic is one who has no understanding, but lost it from some subsequent cause. 1 Bl. 303. Co. L. 24. 3 Bac. 80. Co. 125.

Drunkenness tho- operating as a temporary insanity,  
is not of itself in Law or Equity, a ground on 7.  
wh. one can avoid his contract, it is his own  
fault. The rule is founded in policy.

1 Bos 29.30. 2 P.W.m. 131. 1 Rep. 19. 1 Fort. 62.

2 Lev. 482. sed see Bul. 172 contra.

But if one party drags the other into a state of  
deeb intoxication & then obtains a contract  
from him, Chanc. will set it aside. (1 Bos. 30.  
2 P.W.m. 131) for here the contract is procured by  
fraud.

A party's being of weak understand-  
ing is not per se a sufft. reason for avoid-  
ing his contract. The law does not distinguish  
between the subordinate degrees of wisdom & weak-  
ness in the minds of men, & only distinction it  
recognises is between minds per se & not per se.

Same rule in Eq. 1 Bos. 30. 1 2 P.W. 129.

Fort. 62. 2 P.W.

Secus in Eq. if any fraud or imposition is  
practised upon a person thus circumstanced,  
& if when such a person is a party there are  
circumstances warranting a suspicion of fraud,  
Chanc. will only relieve on the ground of fraud.

1 Bos. 31. 2 P.W. 129. 2 Bos. 228.

The contracts made by infants except in case of 8.  
necessaries, are not binding. 1 Bos 32-29.  
In law they have no situation. See Dan & Ch.

The contract of a game coot. is regularly void,  
on count of a moral incapacity or freedom to  
assent. 1 Bos. 59. 112.

His capability rests chiefly in want of property  
or control over property. 1 Bos. 59. 112.



Who may in their agent to contracts and others as themselves.

4. A person may by contract and others in-  
sine himself. 1 Ch. cas. 171. 2 P. 112.

9. If a tenant in tail agrees to alien his lands he is bound by  
contract tho' to the disinheritance of issue in tail. 8 Ch. with  
compel him to levy a fine & convey a reversion to contract, for  
interference is in his power & tenancy in tail is not favoured. 1 Ch.  
The certain free trust to an estate may, by his  
agreement to which trustees are no party, ~~make~~  
bind them as well as himself. 20. acc. 1 Ch. cas. 173. 208.

4. A trustee may under some circumstances bind  
the estate of a certain free trust. 17. 1 Ch. 359. 357.

When mortgage. P. 113. 8. 1 Ch. 315. 15. 1 Ch. 335. 7. 20. 3. 37. 663.

This is to prevent fraud on 3<sup>d</sup> persons.

But, and give purchaser not equal Eq. & the title  
at Law.

It is a maxim in Eq. that where Eq. is equal on both  
sides it will be declared in favour of the side on which  
it is up.

See, Lancelotti <sup>and in the</sup> may convey a (freehold) estate of his  
land at Law, & the latter aft. former's death may be com-  
pelled to convey. 2. 1 Ch. 1213. 2 P. 115.

See 4. 1 Ch. 335. 1 P. 115. & 3. purchaser money will go  
to 3<sup>d</sup> principal representative of 3<sup>d</sup> ancestor.

10. So 3<sup>d</sup> contracts & a woman made before mar-  
riage, will in part bind 3<sup>d</sup> husband after marriage.

1 P. 123. 10. 1 Ch. 1007. 2. 1 Ch. 345. 1 Ch. 351.

for he takes her "cum onere".

11. If a tenant in tail agrees to convey to another person  
(which is not in tail) his issue can't be compelled to  
execute the agreement. tho' 3<sup>d</sup> tenant might have docked entail  
yet not having done it his bare agreement can't deprive them of their  
legal rights. 2. 1 Ch. 350. 4. 1 Ch. 207.  
1. 1 Ch. 235. 5. 1 Ch. 278.  
2. 1 Ch. 554. 1 P. 125.

secus. if the heir receives consideration for it. the ancestor agrees to convey. The former by this act accepts & takes benefit of the agreement. (1 Ch. cas. 171. 1 Bos. 136.) & is ergo bound in conscience to execute it on his part.

The agreement of tenant in tail <sup>dispon</sup> of permanent products of estate can't bind him, for this is part of inheritance. Ex. agent to sell timber trees &c.

11 Co. 50. 2 Ch. 194.

1 Bos. 127.

And of power representations are implied in himself even tho' they were not named.

20 J. W. 197. 1 Bos. 128.

of Principal & Agent. see 3 J. W. 247. & 12.  
"Secd 35 & Mas. & Levt." 2 Eq. cas. 31. 1 Br. P. C. 549.

If a joint-tenant agrees to convey his part of estate, <sup>in before agreement is executed</sup> & then is not bound by it but will hold 3 whole.

2 Fern. 45. 6 J. 1 Bos. 129.

Heald on Levt. 35.

But if in Eq. it amounts to a severance of joint-tenancy & surviving partner must be bound.

2 Ves. 334. Co. L. 59. 6.

4 Fern. 6. 277. Heald 35.

Qu. Does not an agreement always amount to a severance in Eq.?

Consent to a contract may be expressed or implied. expressed, as, by words signs &c. & may be either. (valid) - as, precedent, concomitant or subsequent. 14.

Fait assent may be inferred from omission or inaction when he is in a situation when he should act.

1 Bos. P. C. 387. 1 Bos. 132-5.

Bos. on Ma. 125. 1 Ves. 6.

2 Fern. 151. 10 J. W. 278. 1 Fern. 370.

See "Hortons" 58.

Bos. on N. 185-5. 1 Eq. cas. 358.

Ex. Prior mortgage is present when a mortgage is contracting with a 2d mortgage for same subject.



if it. if Eq. will enforce such an implied assent even against an infant. 1 Bos. 133.  
Barnardist. 1023.

15. In order to raise such an implied assent from antecedent silence it is necessary his silence be voluntary, if then he is forced into silence, no such assent is imputed against him. Bos. 13. 15.

The law will only imply an assent when necessary to give effect to an express contract. 1 Bos. 136. Co. Lit. 36. 2 Bos. 35.

Ex. right of way to land bought or owned.

According to some there is a tacit assent to every contract, as if one fails to perform he is made liable.

Bos. 2 Bos. 1011. 3 Bos. 106.

This J. G. thinks overrefined, & is theoretically incorrect from 3 rules of pleading.

16. When one usually employs another to contract he tacitly assents to contracts made by him. Mass & Chanc. 55. Bos. 138.

Grant in some case of grant, lease, release &c. there is an implied assent until there is an actual dissent. See Sect. 42.

Bos. 138. 4 Bay 375. 2 Root. 26. The 3. 2 Barn. 233. 3 Co. 26-7.  
So the assent of an heir at law to property descending to him is presumed. 1 Bos. 139.

If a husband turns away his wife without support, he is under obligation to pay her debts. This is tacitly implied. 1 Bos. 132.

Upon the sale of pers. chattels, there is an implied warranty on the part of the vendor, in  
the vendee take the risk upon himself exclusively. 17.

1 Parke. 109. 372. 3 F.R. 57. Esp. Dig. 632.

What circumstances will invalidate assent given.

There are many circumstances wh. may invali-  
date the assent given to a contract, even tho' express.

Ex. Ignorance or error in some cases.

1 Rob. 138. 9.

As, a mistake occasioned by the fraud of the  
party, it is not binding in eq. 1 D. W. 239.

14 Ann. 19. 20.

Since when an heir at law was fraud-  
ulently induced to believe the will of his ances-  
tor duly executed, parts with his right for a  
small compensation, he is not bound.

If upon a doubtful point of right, two persons  
compromise, this compromise will be binding tho'  
it wd. seem, by law, have fallen to either of them.

1 Rob. 142. 2 Atk. 587. 2 Burr Ch. 27. 1 D. W. 745.

But if the party really entitled is ignorant of the  
extent of his right, says G. P. O. W. he must mean  
of the quantity or value of the subject contending  
about, i.e. under a mistake as to the matter of  
fact) & if he means of informing himself, he  
seems not to be bound as the case may be. 18.

Ex. Case of a bequest of a daughter of \$10,000  
when her orphanage part was \$40,000, she ac-  
cepted of former & released the latter.

Release set aside. 1 Rob. 144. 5. 3 D. W. 310. 2 Rob. 200.



where in case of *Lundown v. Lundown*, both parties  
being advised by opinion of another as to right  
in question. The contract was not void in law.

This was a case of a schoolmaster.

(*Bo. Sabersa*)

2 Bos. 196.

1. Modley 368.

Finally, speaking ignorance of law is clearly no  
ground for avoiding a contract.

2. Goff 404.

Insurance contracts by C. L. are in genl. bind-  
ing.

1. Loe. 876. 1. Loe. 33. 5. Burr. 2802.

See "Insurance 19".

It is not essential that an event upon which it  
depends be in itself contingent. Ex. Ship at sea lost or safe  
not binding when they affect of peace  
of 3<sup>d</sup> persons.

Coop. 37. 3. M. 693. 2. D. 610.

1. Bos. 196.

All wagers are made illegal by Cont. Law. H. Cont.

The - except gambling wagers.

19. There are cases in which a contract of an intended  
purchase is invalidated by erroneous representa-  
tions, ex. If a misrepresentation regards  
material quality or subject which furnishes a  
prima facie inducement. Ex. Of a mill seat pt. (1. D. 400.) has no  
water power. 2. Bos. 196, 21. 1. Bos. 1474. 2. Burr. 185. 1. D. 32.

Recap - if a misrepresentation relates to  
that which does not furnish a inducement to  
purchase he is bound. & his relief lies  
in a <sup>compensation</sup> ~~contract~~ <sup>action</sup> ~~action~~ of right of value.

1. Bos. 1489.

Ex. a mistake in  
quant. of rent given for land. The law an action he retained  
for this diff. Ex. may enforce contract.

If on an agreement, a purchaser makes it an  
express <sup>condition</sup> ~~condition~~ <sup>agreement</sup> ~~agreement~~ that the subject shall contain certain

qualities, non-performance of condition & such  
other things. 1 Dow. 150

20.

Intention of parties may be inferred from  
circumstances, & intent of agent may be  
inferred in the same way.

Ex. Sale of a female slave in 7 days  
of a male - 1 Dow. 150.

see case of 3 horse 1 Dow. 150 - 2 J. La.  
contra shopped to law & to all other authority.  
and 3 contract is binding. "caveat emptor"  
is maxim in such cases. 3 D. R. 757. 180. 133. 600. 818.

Long. 23. (Book R. 15. 127. 2 East 111. 122  
120. 133. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 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2277. 2278. 2279. 228



"States Rev. & Revs." 29.

1 Nov. 1867. 46. 132.

There is now a great inst. in ~~the~~<sup>place</sup> the  
not in the.

100. 58-5. 160. 234.

Ex. A. contracts to purchase Black-wear & convey to B.

23. But a cont. expanded many and a genuine  
interest. by way of ex<sup>pl</sup> see in effect on  
way it. 2 Vol. 250. Co. Lit. 200. Post 222.

The same rule as to leases or mortgages of land not belonging at 3 time to 3 person or mort-  
gagor -

Lath. 270. Pos. a mortg. 285-6.

2 Feb. 164. 1 Ld. Rd. 729. 5 Mod. 258.

2 Ld. Rd. 1048. 1550. Esp. sig. 233 506. 5 R. R. 370-1.

2 Verin. 11. Pos. mortg. 87. 1 R. R. 260. 1 Pos 160.

Lit. sec. 446. Title "Leas" 6.

### Requisites.

all contracts must be first possible of per-  
formance - 2<sup>d</sup> - lawful - 3<sup>d</sup> - certain -

II. Possible - No right can be acquired or any  
obligation created to perform a contract naturally  
impossible. Such contracts are void, since in 3  
nature of them they can't be performed. Ex. to in - 24.  
To go one of lands covered by ocean - to go  
to Rome in 3 days; to suffer a non suit in a  
pending action, when there is no one pending.

(Lex non cogit ad vana - see impossibilia.)

Pos. sec. 735. Co. L. 206. 1 Pos. 180-1 175-8. 1 Roll 420.

But in applying this rule 3 cases distinguish-  
ed between those acts wh. are strictly impossible  
& those wh. are impracticable, as to 1 party contr-  
acting, is agreed to per. (2 Ld. Rd. 1165. 1 Pos. 161. - Dymond  
& latter is binding.

Ex. of contracts to sell  
an estate wh. belongs to B. Now A is liable in dam-  
age for non-performance tho' Chy. will not give  
a specific execution. performance in 3 former case  
unattainable - occurs in 3 latter.

Cases of horse sold geometrical proportion) & if corn sold - 25.  
in same way - see - 11 Ld. R. 1165. 5 Mod. 305. 1 Fort 269.

2 Fort 211. 1 Verin. 219. 1 Fort. 424. 1 Pos 418. 1 Ld. 111. 1 Mod. 295. 1 Feb. 589.

liable to pay 3 price of horse. Vtra. 301.

J. G. thinks 3 contract void on 3 ground of impossibility, & ground -



But a cont<sup>y</sup> is not void on account of impossibility unless altogether impossible.

Ex. If one cont. to perform what is not in its nature of things impossible, this being prevented to perform it by inevitable accident 2 Dene. 1838, 1 Fent. 306. cont. does not discharge him. Doug. 259, "Cost. Hask."

Ex. cont. to be at such a place at such a time prevented by tempest - covenantor liable. Term. if cont. to perform voyage within time within wh. such voyage. do. not be performed.

II. Lex loci. The thing stipulated to be done must be morally possible. No one can be bound in law to perform what the law itself prohibits.

26. A cont. is vs. law when agreement is to do (1) *Per* 103. 51) some thing "malum in se" or malum prohibitum."

A cont. to smuggle goods is as void as a cont. to commit murder. 10 H. 189.

Counts of 3 first class are those wh. are forbidden by the law of nature. Corp. 89.

1 Hask. 103. 1 Fent. 213.

2<sup>d</sup> counts are vs. law when contrary to the law of land or municipal law.

Contracts may be opposed ab initio to municipal law - law - 1<sup>st</sup> as vs. <sup>public</sup> policy, 2<sup>d</sup> as vs. some maxim or principle of law 3<sup>d</sup> as vs. some positive statute.

2 Wils. 341. Corp. 28 1 H. 322-7.

1 B. & P. 272. 8 T. R. 89. 7 D. 543. 5 D. 173.

27. All contracts the object of wh. is a restriction from pursuing any useful occupation or profession are vs. law as opposed to the welfare of the state & are void. Hobb. 211. R. 292.

1 B. & P. 168-7. C. 6. 872 8 T. R. 90

All conts. wh. militate vs. national policy are void as being illegal.

T. R.

1 H. 322 7.

or contract to restrict any useful trade even  
for a limited period. *Ed. the void. 1 D.M. 181.*

*1 D.M. 187. 11 Co. 53 b. to L. 206. b. c. L. 206.*

Ex. If a husbandman agrees not to till his land.  
But an agreement not to exercise a trade in  
any<sup>#</sup> particular place do. be binding.

*Palmer 172. Long. 4. 596. 1 Bull. 186.*

But tho' valid, it is not prima facie.  
It is not binding, in sufft. consideration,  
for  $\gamma$  presumption is vs. it, arising from  
 $\gamma$  jealousy to  $\gamma$  towards such contracts.

If sufft. consideration it may be  
enforced. *2 Tra. 739. 109 Mo. 27. 130. 53.*

*13 Mo. 181. 192. Palmer. 172. 1 D.M. 158.*

\* But  $\gamma$  must probandi his with  $\gamma$  sufft. - sh. geny. his with deft.  
And it is not material whether  $\gamma$  trade sh. 28.  
one votes not to exercise, if his trade or  
not. *1 D.M. 172. 1 D.M. 158.*

On is principle of its being opposed to pub.  
lic Justice, a contract for maintenance  
is void. *1 B. 13. 1 D.M. 172.*

by maintenance is meant  $\gamma$  upholding of another's lawsuit.

So a contract with an "alien enemy" is  
void, as being opposed to public welfare  
This is  $\gamma$  genl. rule. *8 D. R. 638. 1 D. 85.*

*2 Roll 173. 1 D.M. 173.*

Determined in *18. 22.* (15 Johns.) that a partnership  
existing between a govt. of this country & a govt. of another, declara-  
tion of War between  $\gamma$  two countries ipso facto dissolves  $\gamma$  partnerships.

And a policy of susp. on  $\gamma$  susp. of an  
alien enemy is void, - It promotes  $\gamma$  commerce  
of  $\gamma$  enemy & gives our own citizens an interest in  $\gamma$  sec-  
urity of  $\gamma$  commerce. *1 East 46. 478. 8 D. R. 518. 5 do. 35. Long. 238.*

*1 B. 8. P. 318.*



29. A ransom contract with an alien enemy is  
good by 3 genl. public law of Nations.  
1 Burr. 1758. Doug. 619. "P. 1045" 30.  
1931. R. 505. Ins. 3.5. 53.

But an action will not lie vs. a ransom  
bill, untill 3 restoration of peace.  
Marsh. on Ins. 27. 6 T. R. 29.

A ransom contract can only be enforced  
in an Admiralty & not in C. L.  
Marsh. on Ins. 302. 600.

"Insurance" 3.5. 98.

Exception to 3 genl. rule. Such contracts in  
genl. with an alien enemy as arise out  
of a state of hostility, & tend to mit-  
igate 3 rigours of war are binding.  
Doug.

The truce, & cessation of arms, & also  
an agreement for an exchange of prisoners.

In Eng. ransom contracts are not prohibited  
by Stat. 22 Geo. III.

"Marsh. on Ins." 452.

30. Upon 3 same genl. principle, viz. opposed to public  
welfare & policy. Marriage brokerage contracts are  
illegal, i.e. bonds given for assistance in promoting mar-  
riages,  
1 Burr. 578-5.

3 Lev. 411. 8 T. R. 189. 1 Dougl. 244. 5 T. R. 174. 11

As to promises & agreements of 3 same kind.

2. Contracts again may be unlawful as con-  
trary to some maxim or principle of law,  
since if 3 consideration of 3 promise, or 3 promise  
itself, or 3 thing stipulated to be done, is con-  
trary to any principle of law 3 contract is unlawful  
& void.  
"Bulst." 1 Dow. 176.

Thus a promise in consideration of promise is fraudulently discharge a debt due to his master was held void. 5 Halk. 94. 31.

Consideration is opposed to principles of law & ergo is void.

Do if M<sup>rs</sup>. promise to suffer an escape.

1 Poo. 146. Cro. E. 189. 10 Co. 76. 102.

Do if a third person who promise to M<sup>rs</sup>. a sum of money to permit an escape.

The consideration is illegal.

M<sup>rs</sup>. had.

Again a promise by any minister of justice to do an unlawful act is illegal & void.

Cro. E. 270. 10 Poo. 156.

But if a fact wh. makes a <sup>consideration</sup> unlawful is unknown to a promisee, a contract of indemnity may be binding. 10 Halk. 11.

#

Hutton 30. 10 Poo. 177-8.

Ex. The p<sup>l</sup>ty. in an excheq. is in a p<sup>l</sup>. ga. requests a M<sup>rs</sup>. to take certain goods as a gift. wh. are not, & promise to indemnify him & promise is good.

\* Ex. of. brings B. to a law, promise to a host to indemnify for keeping him as prisoner. Tr. a case ex del. 17 Little 6. Ex. 10.

Again, all contracts wh. militate vs. 33. all morality & decency are void on ground of illegality. Cro. E. 32. 229. 235.

2 J. R. 693. 220. 610. 1 Poo. 182. 223.

Ex. Wager as to a sex of a "Chevalier de Yon" - and a writ. made for any corrupt purpose, as by way of bribery is illegal & void, or if one makes a wager with a counsel or judge by way of bribe. 1 Poo. 184. 1 J. R. 56.

(bribe 29.)

Do if a wager is but a cover for usury. - or an illegal game 2 H. B. 42.

1 Poo. 182-4. 7 Halk. on Reg. 46. 2 J. R. 610. 1 J. R. 56.



But a wager between two parties upon a pend-  
ing suit is good at com. L. it does not create their  
interest in the issue.

Leaps. 27. 1 Nov. 1855.

Wagering contracts are at C. L. binding, tho' late-  
ly in Eng. have been (1200. 146. 4th 1851) decided not.

129. R. 591. 270. 510. Marsh. 1851. 96.

In com. wagers are void by Stat.

Who of money bet knowingly at a time & place to game with  
4 to a party gambling.

Post 37.

34.

Another class of contracts are those made  
to defraud third persons; these are ille-  
gal & void. Eng. 413. 1150. 1851. 186. 12 R. 160.

174 B. 322. Ex. 1851. 2 R. 763. 1305. 8. Pol. 95. 286.

1200. 1851. 270. 1851. 176.

Ex. Agreem. between two sutlers to cheat a government  
in furnishing supplies for an army.

Contracts of this kind are void both in Eng. &  
at Law.

Who a secret engagement of one of the par-  
ties to a marriage to repudiate part of a marriage portion.  
Who a contract made in fraud to prevent a  
fraudulent contract from taking place.

1851. 270. Ex. 1851.

Ex. Bond given to suitors of \$100,000 was void, if (as must be agreed, and void, if)

Who contracts with a person at auction, then  
are a fraud upon the person & are void.  
1200.

Who a wager between A. & B. to commit an  
immoral act or illegal act is void.

These passages marked thus belong here.

III. 3. Contracts prohibited by St. Law is  
void.

The numerous contracts are void.  
Eng. The relation to revenue is 12th Anne.

1200. 1763. 1200. 1851.





But suppose a Shff. takes a bond of "case & favour" made void by Stat. 13<sup>th</sup> Hen. 6.

Shff. 40.

1 Bac. 438. 7<sup>th</sup> t. 257. 2 Wils. 351.

1 Bos. 200.

This distinction J. G. conceives arises not from any difference in principle between; effect of a partial illegality created by Stat. in one instance & by J. G. in the other. But from; phrasology & construction of St. i. e. in such cases declares; bond or security void i. e. according to; construction given to; words; & whole bond or security.

If a Stat. shd. merely declare a particular clause or condition in an obligation void, & whole obligation shd. not be void.

But tho' an illegal cont. creates no right sh. can be enforced yet after it has been executed & law in some instances suffers it to prevail by refusing to aid either party in repudiating it.

37.

1<sup>st</sup> Where; illegality is of such a kind q. d. both parties are deemed criminal of; contract is executed - i. e. & unlawful act done. he who has paid, can't recover back what he has paid.

"In rebus delicto actio est conditio dependens"

Doug. 431. & 68. Bull. 1312. 1 Hall. 22.

2 Bos. 1012. Goup. 790. 82 R. 578. 1 D. & C. 7298.

Decay - while; contract remains executory as to; act stipulated for i. e. while; criminal act remains unperformed. Where; other party may recover back what he has paid. (e.g.) money pd. to q. d. to give him to beat B. if; beating is not committed, & money may be recovered back.

"q. d." 13. 14. - Bull. 132. Doug. 471. 1 Bos. 202. 6. 7.

Qu. as to; contract; & distinction on principle? Is it not better to allow a recovery in both or in neither? Distinction also shown in La. Henson - 7 D. 22. 555. 72. 27.

Hence decided y<sup>t</sup>. if money be deposited on an illegal wager & p<sup>ay</sup>d. over with y<sup>e</sup> loser's consent after y<sup>e</sup> wager is decided, is not recoverable back.

Decided before y<sup>e</sup> wager is decided. If y<sup>e</sup> money thus deposited has not been p<sup>ay</sup>d. over either party it has been holden may recover from the stake holder what he has deposited. 8 T.R. 575.

13. & P. 3. 298. Doug. 630. "Mason" on p<sup>ar</sup> 552, 553 Dubitation.

As to money deposited on wager, see 9 G. 2. "unsubst" 13. 14.

Money advanced for y<sup>e</sup> procurement of an officer may be recovered back before y<sup>e</sup> officer has been procured, but not afterwards.

So too in a case of Insurance illegally made.

Doug. 471. 10 P. 202. 206-7.

But when a party, who has p<sup>ay</sup>d. money on an illegal contract, is not himself the "particeps criminis" he may recover back, tho' y<sup>e</sup> contract has been executed by both parties.

This rule holds for y<sup>e</sup> protection of one party against another. 8. M. 13. 132.

10 P. 202. 206-7.

10 P. 202. 206-7.

contra (H. 12.) 1 H. 13. 65. 1 P. 10. 218. 255. 10 P. 202-5.

Thence y<sup>e</sup> money subject of y<sup>e</sup> contract to be repaid, & renders a man nullity.

Such however is not y<sup>e</sup> C. L. rule among gamblers for both are "particeps criminis" & must pocket their own loss.

or security given in consequence of a previous



39. contract or transaction forbidden by law, is not of course void. e.g. J. & B. enter into a partnership for carrying on a smuggling trade, & J. pays all 3 losses & B. costs to pay his proportion 3 costs. is good. 4 Wm. 2069. 3 T.R. 418. 2 H.B. 379.

Watts. "Partners" 180. 3 T.R. 522. 6 D. 61, 308.

2 B. & P. 372. 3. 7 T.R. 630.

It has been held further that if J. pays all 3 losses with 3 promissory & consent of 3 party, 3 will raise a promise to pay.

2 T.R. 61, 405. 7 T.R. 630. 2 B. & P. 372. 3.

This rule has been much shaken, & may now be considered as not law. 2 H.B. 379.

3 T.R. 61, 405.

As to 3 principle of 3 former decision it appears not to be law. There was no obligation on either party to pay the loss. 2 B. & P. 372. 3.

If deposited with a third person to be paid over, 3 party for whom it was deposited can't recover it from 3 depository. "Hough. Ins." 43. 3 Exch. 222  
Park 8. "Hough." 14.

If a person makes a contract 3 making of wh. is made criminal by positive Law, he may be bound by it (tomb.) tho. he d. not claim under it. Ex. by Stat. 21<sup>st</sup> Hen. 8<sup>th</sup> it is an offence for a clergyman to trade, but if he shd. trade, he wd. be bound by his contracts, as a trader (1<sup>st</sup> Edw. 1<sup>st</sup> ch. 19.) For 3 notion of 3 contract is not unlawful, his making of it is only so. He only is 3 offending party & 3 object to 3 Law is merely to punish him.

straint, not grant him an immunity. He can't take advantage of his own offence or of 3 Law wh. he has violated.

So if one trades in smuggling only, he 40. is liable as a trader to 3 Bankrupt Law. 1, 4th. 799.

If 3 object of a contract is perfectly useless, it is void. Ex. agreement not to wash one's hands - in bone? no valuable end to be obtained. Of no advantage to 3 party claiming it.

But not be vs. decency & morality & be void on 3t ground? - not to smile? not to follow a fashion in dress? &c. "Lex non cogit ad vana seu impossibilia". 1 Pw. 251.2.

If contract wh. wantonly affects 3 interest or peace of 3<sup>d</sup> persons is void. Ex. (ante 35.) a wager 3t a person committed a crime, or, as to 3 sex, or any bodily defect of a 3<sup>d</sup> person. 1 Pw. 232. 3. Coop. 729. 735. 3 D.R. 669.

3<sup>d</sup> Certain. (1 Pw. 180. 1 Ald. 270. Holt. 69. 1 Keb. 296.)

Hence if A. promises to deliver goods in consideration of B's promise to pay money in a short time. A's promise is sd. to be void (1 Pw. 180. 1 Bulst. 927. Bro. Jac. 250.)

Because B's promise, wh. is 3 consideration of it, is uncertain & <sup>exto</sup> void.

But a promise to pay money without, & appointing a time for paymt. is good. It is payable immediately (1 Pw. 180) for it creates a present debt (3 D.R. 124. 427.) & no future time is appointed for paymt. - Tho if one promises to do a collateral act & no time is appointed, he has his whole life time to perform. Ex. to make a lease to deliver goods &c.



\*

But. "Id certum est quod certum reddi potest"  
 Hence if I promise to pay to J. whatever  
 he pays out for me, it is sufficiently certain,  
 (1 Bos. 180. 2 B. & A. 118. Bro. Car. 195. 1 H. & W. 270.

1 Kell. 56. 65.) for what he advances for me  
 may be ascertained. ( - as to pay & market price.)

\* J. G. thinks & act ought to be performed within a reason-  
 able time.

41.

### Of the nature & kinds of contracts.

All contracts are executed or executory. (1 Bos. 23  
 2 Bl. 443. - & cont. is sd. to be executed,  
 when & parties transfer propy. together with im-  
 mediate possession. or (J. G.) a present incorpore-  
 ale right of future possession.

Ex. goods sd. for & sold - one having land under  
 lease sells it to vest in possession when & lease deter-  
 mines, & receives & price. here & whole agreement is executed  
 on both sides.

\* agreement to lease in consideration of an agreement to pay rent, executed on both  
 sides. - (debtors.)

Executory contracts are those by wh. no p. of p. is  
 is passed in present but are preparatory  
 to some future act, or, introductory to an actual  
 future transfer. Ex. an agreement to pay, sell, grant  
 &c. in future.

& contract is executory when one performs im-  
 mediately & & other is delayed. Ex. loan of money  
 on a promise of repayment. executory on one side. \* J. G.

again all contracts are express or implied  
 (Mr. Powell says express, construction, or im-  
 plied, 2 B. & A. 118.) J. G. thinks express & implied include

42.

1<sup>st</sup> express contract is one in wh. & parties  
 stipulate in express terms, that 1 Bos. 24. & to be  
 done or omitted. (1 Bos. 14. See Bro. Car. 568. 187. 1 H. & W. 131.  
 (note. being to make & construction contracts.)

2<sup>d</sup>. Contracts Constructive are such as are raised by construction out of instruments or express agreements, & Contrivances, are diff't. from what is instrument. *prima facie* in 80. 2. ports. i.e. they vary from form & terms of instrument or express agreement. from wh. they are raised. This is but a branch of express contracts. (acts. on last page.) 1 Leon. 122. 1 Bos. 277.

Ex. So too where there was a recital in a marriage agreement thus "whereas J. D. is to B. \$10,000 for marriage portion &c." was holden a court. for payment of it. 2 Ry. 652. 10 Bos. 288.

What is a charge in a deed intended may amount to a covenant: q<sup>th</sup> if J. D. grant is c. a piece of land excepting a right of way to it. See "Covt. & P<sup>er</sup>son"

Bro. Elr. 687. Bath. 252. Bath. 190. 11 Ry. 170. 11 Ex. 30. 6. 1 Bos. 238. 9.

So too a reservation of rent in a lease 43. intended amounts to a covenant. by the lease q<sup>th</sup> he will pay 4<sup>th</sup> rent. 1 Ex. 10. 1 Roll 348. 1 Ry. 136. 2. Bro. J. 324. Bro. Elr. 657. 1 Leon. 107. 1 Bos. 243. 4. 1 Leon. 290. 1 Ry. 132.

Implied Contracts are those wh. are not expressed in terms, nor raised by construction from 3 things. 44.

But are such as arise from 3 "res gestae" or nature of 3 transaction.

Ex. Labour man - goods sold. with any express agreement. to pay, a contract to pay is implied.

1 Bos. 243. 6.

So if one delivers goods into 3 custody of another 3 latter implicitly engages to take such care of them as 3 law requires.

q<sup>th</sup> a ship. carries money upon an execution, 3 as involves q<sup>th</sup> he will pay 3 money to 3 ship. in excom. - The <sup>actions</sup> of "Indebitatus q<sup>th</sup> p<sup>er</sup>son" are founded upon promises implied by law.



Ex. right to go on another's land to cut trees bought,  
by way to a piece of land bought surrounded by vendors.  
The grant here is implied. 1 Bos. 2567, 2 Wood. 15. 1 Dand. 322.  
3 Linn. 63. 2 Bk. 36.

secus & grant ed. not be enjoyed.

45. There is also a sort of implied cont. - where  
a lessee goes to. Lohar over, he is con-  
sidered in law & implied, as holding from  
Jr. to Jr. there is a tacit agreement (1 Bos. 258<sup>ss</sup>) to re-  
new & lease.

There are some cases in Eq. of implied conts.  
distinct from those wh. arise in law.

Ex. Land sold in trust for & vendor  
for & vendor until paid for. 1 Bos. 257. 8.

1 Bos. 257. 8. 2 Bk. 272.

Contracts are absolute or conditional.

All contracts are either absolute or con-  
ditional. 1 Bos. 258, 259.

An absolute cont. is one in wh. a per-  
son binds himself or his propy. absolutely  
or unconditionally. Ex. gt. in consideration of a lease  
cont. to pay rent.

46. A conditional cont. is one in wh. & obliga-  
tion or obligation either in whole or in part  
depends upon some uncertain event upon wh. it  
is to take effect, or be defeated, or enlarged or aban-  
doned. 1 Bos. 259. 2 Bk. 152. Co. Lit. 201.

Ex. gt. promise to pay £100 on condition that he marry B.  
by such a day, or that he marry land by such a time.

1 Bos. 259. 2 Bk. 154.

Innow. R. 83.

Ex. gt. sells propy. to B. yet he shall  
pay \$10 for it in one part & \$5 in another,  
& cont. is conditional upon & amt. to be paid.

2 Park. Ins. 712. 2 Park. sec 712 1 Bos. 260.

of 19. agrees to sell to B. for such a sum  
as C. shall say; obligation is suspended  
until C. decides, but if C. shd. never  
decide, contract wd. be annulled,

Pos. 261. Lys. 9. 6.

47.

The distinction between absolute & conditional  
contracts leads necessarily to unlawful con-  
ditions. The effect of unlawful condi-  
tions vary according to the nature of the contract & the  
condition. (ante 26. 35.)

1<sup>st</sup> If an unlawful condition is annexed to an  
executory contract, the whole contract is void.

Then if one is bound in an  
obligation to do an unlawful act, the whole  
bond is void. Pos. 261. Co. Lit. 206. b. Esp. 135. 825.

\* If the condition militates vs. public policy, or publ. welfare.  
Ex. In restraint of trade &c. 1 Esp. 183. 5. 1 P. 476 181. 4 Burr. 2225. <sup>(ante 26. 35.)</sup>

Shall not stipulate for iniquity.

2 Esp. dig. 135. 182-5.

The rule is the same where the condition is for  
the omission of any legal act.

Esp. 135. 185. 2 W. 354

Co. L. 206. 3 Lev. 411. 2 Vent. 189

\* In such cases the law frees the obligation from the  
penalty, lest he (in one class of cases (i.e.) cases in  
wh. the unlawful act is to be done by him, shd. be under  
a temptation to commit the crime. (1 Pos 296) & deprives  
the obligee of any benefit from it - lest he shd. be  
under a similar temptation (in another class of  
cases viz. in wh. the act is to be done by him.



27. If an unlawful condition is annexed to an executed contract, the condition only is void. (generally.) Ex. If one make a conveyance of land with condition &c. & condition is void but the conveyance is good, yet it is a contract executed.

Hence the aid of the Law is not necessary to enforce the contract of conveyance, it being executed by the parties.

Thus if one makes a feoffment or grant, with condition &c. & the same shall be an unlawful act, & consideration only is void. The feoffment is good & the estate is absolute. (1 Bos. 261-2. 2 B. & B. 197.)

Co. L. 206. b.) Hence the feoffee may be under no temptation (at sup.) & the Law secures the estate without performing the condition. (1 Bos. 261-2.)

48. But the effect of the condition in these two cases is different. The principle is the same in both. In the former class of cases, i.e. when the contract is executory & the condition unlawful; the law will not enforce it - In the latter, i.e. when the contract is executed, & both parties are criminal, the law will not aid the feoffment &c. to repeat it. So that in both cases the law leaves the parties as it finds them.

But this latter rule holds only when the parties are in "pari delicto" or both criminal; & it is otherwise when the feoffment is not "particeps criminis" as if a mortgage is made to secure money,

(ante 38) in such cases & conveyance is void, & they  
& innocent party is protected.

The bonds in restraint of marriages are void.  
The condition being unlawful. Esp. 183.4. 4 Burr. 2225.

The bonds for withholding evid. (Esp. 183. 2 Kent. 109,  
& Wils. 333) The bonds to secure a reward for pros-  
titution, if given before hand, secus - if given  
afterwards. 3 Burr. 1568. 1 M. & R. 517. 3 Wils. 339.  
& P. M. 332.) in & former case they are an in-  
nuent. to immorality, in & latter not.

All conditions repugnant to & nature of &  
contract are void. Ex. feoffment. in fee or con-  
dition y<sup>t</sup> feoffee shall not alien; or shall not  
take & profits. The condition is vs. L<sup>as</sup> & the  
estate is absolute. 1 Cow. 262. Cro. J. 9. 596. 2 Ken. 233.

But a bond or contract by feoffee y<sup>t</sup> he will 49.  
not alien, or y<sup>t</sup> he will not take & profits  
is good. For this does not disable him to  
alien &c. but merely subjects him on his  
bond &c. if he does. (Ib.) Ex. bond y<sup>t</sup> feoffee  
shall have & profits. It makes feoffee a trustee  
to feoffor. it acts.

Conditions may be possible or impossi-  
ble. Possible require no exposition (see 1  
Cow. 263. 4.) Impossible are,

1<sup>st</sup> Such as are so at & time of & contracts  
being made, or - 2<sup>d</sup>. Such as become so  
afterwards. 1 Cow. 264.

1<sup>st</sup> If a condition possible at & time of mak-  
ing it, but afterwards becoming impossible by



act of God, or of Law, or of the party claiming, is annexed to a contract executed; the contract is not avoided by non-performance. (Co. Lit. 206. b. 1 Bro. 264. 5. 444. 5.) Rule 3 same if the condition become impossible by the act of the party granting the interest. Secus - if it becomes impossible by the act of the party to whom grant is made. In this case the grant is defeated or becomes void. (1 Bro. 420. Co. Lit. 210. b. 1 Post 138.

Ex. feoffment. grant, &c. - conditioned y<sup>t</sup> the feoffee shall within 6 months go to London on feoffor's business, the feoffee dies within the time; the feoffment becomes absolute. sed. 70 Mod. 208. 1 Co. 98. 10 Mod. 35. 1 Bro. 446. (1 Bro. 264. 5. 444. 5.)

For the estate is executed & can't be devested but by default of feoffee, <sup>and in non-performance</sup> the other words of Law will not deprive him of an interest already vested, unless he has been guilty of some default.

50. So if feoffment on condition y<sup>t</sup> feoffee 6 months perform a certain voyage for feoffor. The voyage is then prohibited by Stat.

It becomes impossible by act of Law, or by legal consequence of some intervening. 2 P. W. 218. 1 Ash. 198. 5 Bro. P. C. 254. 8 Mod. 51. 1 Bro. 446. 389.

4. makes a grant to B. with condition y<sup>t</sup> he marry another within six months, & grant within the period marry another. non performance being impossible by act of Law, the estate becomes absolute in grantee. - But if such a condition is annexed to a contract executory, & becomes impossible by act of God &c., it is annulled. 2 H. Bl. 126. 1 Ash. 176. 1 P. W. 218. 2 H. 384. 1 Bro. 446. 1 Co. 206. b. 1 Post 138.

If a contract being executed, no advantage can be taken by the obligor, for non-performance till there is a default in him.

If he who receives himself incapable to perform by his own act, he is culpable & liable, for he can't take advantage of his own wrong - 1 R. 5 R. 20 5 Co. 21-a.

Ob of a bond with condition - if L. D. shall appear at Pl. such a Ct. if he dies in the meantime, the obligor is discharged. 8 Co. 92. Co. Lit. 206.

Law. E. 374. 2 R. 240.

1 R. 417. 420.

5 Co. 21-a. 10 Co. 215.

Again if it gives a bond, yet he shall marry & obligor within such a day as

it ought. 8 R. 230 8 Co. 92.

Co. L. 206. Co. Lit. 206. 375

If it gives a bond to B. conditioned to export <sup>certain</sup> cargo to him by such day, yet if he can't export such <sup>cargo</sup> contract is discharged. it ought.

If a obligor either for want of or supersedes with a performance, he can't claim a benefit. 1 R. 618. 2 R. 283.

Lang. 265. 1 R. 123. 1 R. 53. 1 R. 519. 2 R. 390. 7 R. 383.

If a act of a stranger is by a term 32. of a condition made necessary, as void. of a performance of a condition, & a stranger arbitrarily refuse to give such evidence, a obligor is liable for non-performance, even after he has performed.

Note - case of Insurance vs. Linn - see 2 H. 73. 374. 5 Co. 29. 6. 6 R. 710. but it was not a case of condition precedent 5 R. 719. Suppose a condition to be subject.



If a bond is given - conditioned with one  
of two things in an alternative, & oblig  
is bound to perform so long as either can  
be performed, in impossibility was 12305.88.242.1 occa-  
sioned by 3 obliges.

Ex. to convey a house or land house is burnt  
by lightning, he can't convey a house but he may  
a land. "Munie. L." 32.37. ante 10.18.

If a condition of a bond becomes partially  
impossible, by act of God, &c. the obligor  
is bound to perform what is possible of  
the obligor remains it "q. pres." 283. Co. L. 282.217.  
22051. 1707. 14. 11 22 R. 254. 22 R. B. 103. 88. 2 Bk. R. 271. 10 Dec. 448. 75.

Ex. Bond for a lease of 60 yrs. & 4 st. aft. prohib. "Munie. L." 28.  
longer leases than for 20 yrs. obligor must lease for 20.

If a contract contains a clause making  
the obligor judge whether a condition is performed  
or not, the clause is void. 220. 22. 308.

No man can be judge in his own case. Law forbids it.  
In 1818 in Jersey branch, resolved it in an  
agreement to sell goods for approved notes, vendor can't  
refuse such as are clearly good.

The jury are to decide a question, inde-  
pendent of any other decision - it is a question  
of fact.

2<sup>d</sup>. Where a condition is impossible at the time of making  
the contract its operation depends upon its being sub-  
seq. or precedent.

A condition precedent is one which must  
be performed before the obligation  
or depending upon it can become at all.

1st subseqt. condition is one by wh. a right, obligation &c. already vested <sup>to the</sup> is qualified <sup>by</sup> this, called a condition.

Co. L. 206. 2 Blk. Com. 1567.

#### Rule.

If a precedent condition is impossible at time of making of contract, & estate &c. depending upon it is void.

Co. L. 205. 2 Blk. 156.

2 V. 200. 206.

For no right or estate passes till condition is perfect.

If a precedent condition is possible at time of making of contract, but becomes impossible afterwards, yet the right can never vest. (I. G. supposes this a clear case tho. he finds no authority in books.)

Tho if a precedent condition is unlawful no right can be acquired by performing an unlawful act (2 Blk. 157.) Ex. lease to J. D. to take effect on a future day, if before that time he shall do a certain illegal act.

If a subseqt. condition is impossible at time of contracting it has no effect what.

Co. L. 200. 2 V. 206. 2 Blk. 158.

Ex. a contract made, upon condition, that to B. & C. shall pass from A. to Banton in 48 hours. - & it is void in law with none effect of a condition. - it is a legal nullity.

For in the case of a preempt. & estate is vested, & in the case of a bond & penalty is "debitum in presenti" & a void condition can't defeat either. 2 Blk. 157. 207. (also 57.8.)



54. In the case of express contracts if this im-  
mediate condition is incorporated with the body of  
the obligation, instead of being underwritten or endorsed,  
in the form of a defeasance, the (1 Stark. 172, 180. 265.)  
whole obligation is void.

For there is no habitus in presenti no distinct  
final part, creating a present debt. It is rather  
in the nature of a condition precedent & must be  
so in effect, & G. thinks in every case of this kind.  
See C. L. distinction between special & simple  
contracts post.

55. There is a distinction between written & un-  
written contracts, introduced in certain cases  
by the Stat. of frauds & perjuries. 13 Geo. 3. 157.  
13 Geo. 3. 72. 1 Geo. 2. 263.

One Stat. on the same subject was enacted  
in 1771 & is, as far as it extends to the same sub-  
jects, substantially a transcript of the English.  
18 Geo. 3. 354. -

Under the Stat. of frauds & perjuries, the  
following & following contracts or agreements will  
not support an action at Law or in Eq.  
in some agreement on some note or memo-  
randum, if it is in writing, signed by the  
party to be charged or by some other per-  
son by him authorized.

56. 1<sup>st</sup> Promise by an Executor or Administrator  
to answer out of his own estate for any debt or  
liability of his Testator or such a promise not in  
writing does not bind him.

2<sup>d</sup> A promise by one person to answer for the debt  
of another or suretyship of another.

3<sup>d</sup> A promise in consideration of marriage.

4<sup>th</sup> Contract or sales of goods or money, &c. &c.  
and subject in or concerning them.

By "contract or sales" are meant sales or  
contracts for sales. 4 D.R. 680. 683.

Rev. St. p. 140. 7. 1 Dec. 72.

5<sup>th</sup> Contract not to be performed within  
1 yr. from time of making.

6<sup>th</sup> Contract for sale of goods of £10 value 57.  
or more - (cont. p. 55.) It extends as well to execu-  
tory contracts as those to immediately (2 H. 3. 63. 7 D.R. 14.  
executed. 1 H. 3. 63. 7 D.R. 14.)

The object of 4<sup>th</sup> St. is to prevent a proof of  
contracts of this description by parol evi-  
dence, it being supposed that there is danger of fraud  
in proving it.

1<sup>st</sup> 4<sup>th</sup> St. to promises by execs. &c.

It has been so. & it is if a person has  
acted, his parol promise will bind him.  
as it constitutes a consideration advan-  
taged to himself - so as to transfer it  
to him personally. (See no authority.  
nor is it law. 1 H. 3. 1 Rob. 200. 7 2 D.R. 150.)

The Stat. does not provide upon a distinc-  
tion between agreements with consideration & those  
without. and - If a promise is made with  
consideration wd. have been void before the Stat.  
was made, & if every parol promise upon  
consideration is good, since the Stat. provision  
is a bad letter (cont. 55.)

A contract - proof of a party will clearly not raise  
an implied promise to change & exec. personally.  
5 D.R. 690. 1011 ex. 464. One holds contra by the King see 1000. 288.  
7 D.R. 350.



59. Administrator submitting a claim <sup>being</sup> to an  
administrator, was once held to be an  
admission of assets.

(1 D.R. 67, 152.) This is overruled. 8 S.R. 6.  
7 R. 458. Toll. 463.

For an administrator may be desirous of ascertaining the ex-  
istence or amt. without knowing whether he has assets.

But if on such submission of assets  
award of an administrator shall pay a certain sum, he  
can afterwards pay assets to the amt. vs. the other par-  
ties. It is equivalent to a finding of assets to that  
amt. 7 D.R. 483. Toll. ex. 463.

Same rule holds as to Exec. see "wards" 10.

But acceptance of a bill of exchange by a drawer,  
Exec. is an admission of assets to the amt. of the bill  
simple or rather White, 3. 712. 14. 73. 622. 5 Wils. 2 Str.  
1200. 2 Burr. 1245. 1 D.R. 38. ) secus 32. because  
might be repudiated. Besides it act plainly  
implies an admission. It is a transfer by  
holder's Exec. - Whit. 111. 2. 3 Wils. 1. 2 Str. 1200.  
Post. 69.

50. If an Exec. of a holder of a bill endorses it over it being  
It is no admission of the property  
of assets.

But this is because he is acting as a trustee  
not owner, in a legal capacity of course  
as a trustee in his hands &c.

That if testator was indebted is not sufficient

7 D.R. 350. n. Corp. 293.

1 Wils. 145. Toll. ex. 464.

It is a simple contract only.

The object of § 7 Stat. is not to make Excr. liable in all cases even if promise is written, - but in those only in which before § Stat. he has been liable on a verbal promise.

(Robt. 14th. 120. 17th. 126. 7th. 12. 350.)

§ 7 Stat. to make Excr. personally liable on his promise if written there must have been an existing claim which bound him as Excr. - secus if there can be no consideration.

(Hunt. 186. Cro. Jac. 77.)

Robt. in 11th. gradus 126. m.

The consideration must appear in writing. (which under 2 clause 1st 44) § 7 Stat. 10. Cro. Jac. 107.

(Robt. 115. 107.)

But the in Cont. as every writing is to be a special one. - see § 9. & see Robt. 104.

He takes advantage of this clause 1st. must have been Excr. & when he made a promise.

(Robt. 120. 4th. 330.)

Ex. promise by one in consideration of being made administrator is not within it.

Not necessary to aver assent in an action on a promise; for debt is subjected if at all "re bonis propriis" 61.

(Robt. 205. 6.)

2<sup>d</sup> To answer for a debt, default or miscarriage of another.

62.

Under this clause a general distinction is to be observed - If a promise made for a benefit of another is original it is binding though verbal - but if it is collateral it is not binding unless in writing.

Cowp. 227. 11th. 126. 25p. 1012

1 Burr. 188. 12th. 1087.



In 7 latter case it is a promise to answer for  
7 debt &c. of another, in 7 former it is not.

Note - The words "original" or "collateral" are not  
used in 7 st. - In original promise is  
not one to pay another's debt, but one's own.  
Collateral is to pay another's.

1<sup>st</sup> A promise is sd. to be original -  
105. When 7 3<sup>d</sup> person for whose benefit  
it is made is not liable at all, for 7 same  
debt or duty, to 7 promisor - so yt. there is no  
debt due on his part. Robt. 209. 236.

Mass. cv. 212. Bull 281.

1 Burr. 1921.

2<sup>d</sup> When his liability, tho' before existing  
is not extinguished on 7 promise being made  
Robt. 223-4. (questioned part.)

3<sup>d</sup> When there is a mere consideration arising  
out of a mere & distinct transaction or receipt  
& moving to 7 promisor.

1 Burr. 1586. Robt. 232. 5 Esp. 1288.

4<sup>th</sup> 7 original debt is, as to 7 measure of  
what is to be paid, for another's debt.

2 East. 345.

In whenever 7 case answers either of 7 above re-  
scriptions, the promise is not in construction of  
law, or in effect to answer for 7 debt &c. of another.

63. But when 7 promise is merely in aid of a subsisting  
& continuing liability on 7 subject part of such 3<sup>d</sup> per-  
son; or to procure credit for him (i.e. when 7 prom-  
ise is to furnish an additional security & remedy, it  
is collateral & goes within 7 st. - (and to these dis-  
tinctions. 2 Bay 455. 5 Mod. 205. 2 Phil. 32. 12. 306.  
2d Ed. 7085. 6. Halk. 27. 45. 102. 1 B. & P. 358. 1 H. B. 12. 1000.

Pratt's ed. 212.) for in all such cases if promise is in effect to answer for & debt of another.

1 Ex. ct. says to a merchant, "deliver goods to J. D. & charge them to me" or deliver them on my account or "deliver & I will pay you" & promise is original. In J. D. is not liable at all. It is original debt. 2 D. R. 81. 1 D. R. 120. L. R. 187. Rel. 209. Dis not to answer for another's debt but his own.

But if J. D. had said "deliver to J. D. (not sup.) & if he does not pay you I will" it is collateral. Coop. 227. There is intent to pay & charge that he in 3 first instance vs. J. D. & receiver.

He is ex gr. 3 original debtor, & 3 promise is of course collateral. 1 Ex. R. 120. 2 L. R. 185.

Halk. 28. Ex. 102.) J. D. is ex gr. a promise by J. D. to pay J. D.'s debts, in aid of his liability, & to procure credit for him. Rel. 209, 210. 2 D. R. 81.

So to "supply my mother in Law with bread & I will see you paid" holds collateral or rather according to latest opinions "prima facie" so because of 3 presumed intent as in 3 last case. (Cited 2 D. R. 80. 1.) Rel. 223. L. R. 224, 1 D. R. 128.

Halk. 28. contra & bita.

Id. Mansfield if such a promise before 3 6th. delivers if 3 prom. was original. then being then no liability on 3 or person. (Coop. 228, 91.) since overruled. 2 D. R. 81. Rel. n. p. 209. 10) sed. qu. Whether La. Mansfield's construction of 3 promise is not correct in the words whether 3 intention is not, if promise shall be made 3 debt in 3 1st instance; at any rate it is now holden that when 3 promise is in this form of credit in collecting 3 intention, are at liberty to consider all 3 circumstances of 3 case & 3 situation of 3 parties. 1 D. R. 8. P. 150. Rel. n. p. 223.



ex. "Suppose such a seaman bound to Canton with necessaries for 3 voyage & at the end of 3 months I will see you paid." - This I should think original, as evincing an understanding that the necessaries were to be charged in 3 instances to 3 promisor.

"If you do not know J. D. you know me & I will see you paid." holden collateral. J. D. to be first charged - (2 G. R. 80. Exp. 101. 2. Robt. 210. 11.) such was 3 evident intent.

(J. D. wishing to procure credit see above.)  
again a promise by me to 3 owner of a horse that he will let him to J. D. I will see him paid. holden collateral. Robt. 219. 232.  
Ld. Rd. 1085. 5. 1108. 258. Park. 27. 3 80. 15.

also it is a legal rule that a promise by one person to answer for 3 act of another is collateral. Ld. Rd. 1085.

65. If A. promises B. that C. shall pay me money & if not, that he A. will pay it, C. being no party & owing to it, it is in substance original. The in your collateral.  
ex. Let me have horse of J. D. I shall pay you. If he does not I will.  
Robt. 225. Pitt. 304.

If A. an agent buys goods at auction & does not name his principal the agent is bound with the vendor. Ld. Rd. 1085. 308. 1921. for he contracts as for himself.

To make 3 contract <sup>original</sup> collateral it is necessary

every pt of it is partly for whose benefit it is, but only is liable upon the same consideration, but here he never becomes liable at the same time when the other promise is made.

Ld. R. 1085.7. Robt. 217. 2 Ex. 232.

And upon the same contract the promisee makes an agreement, as in the last case.

If after goods are delivered to the promisee, he is directed to pay for them to me, in the contract to pay for them my promise is still original - he is not liable when I promised. Ld. R. 1085.7. Robt. 217.

If I promise to pay one of several persons already liable it is original & not within the stat. for it is not to pay the debt of another. E.g. promise to pay costs by one of two defendants. 5 Mod. 205.

Robt. 229. Comb. 362. 2 East 225. 5 Slon. 112.

When according to the distinction under this class of cases the promise is original, the common action of indebitatus assumpsit, not stating a special agreement, is proper, for the promisor is the original debtor.

When the promise is collateral. Then a special declaration is necessary, as upon a written collateral promise. Burr. 273. 2 Lev. 363. Ld. R. 1083.

2. If a promise in consideration that the promisee will extinguish a debt of a third person is original, for it is not in aid of a continuing liability in the 3rd person or to obtain credit for him. E.g.

Brown & Co. lent & I will pay the debt. The former debt of J. D. is only a measure of the sum to be paid as a rule of damages. 1 S. R. 120. Burr. 1888. admitted in argument. Dubitative Robt. 223. 1 N. R. 20.



When  $\gamma$  promisor is  $\gamma$  purchaser of  $\gamma$  debt of another, his promise to pay for it (transfer of it) is clearly not within  $\gamma$  Stat. 1 R. R. 13 c. Rolt. 226.  
2 East 325.

This is not a promise to pay  $\gamma$  debt of another but to pay for  $\gamma$  transfer of it - Ex. Transfer to me L. O. bond & I will pay you  $\gamma$  amt. of it like a promise to pay for any chattel.

3<sup>d</sup> Where there is a new consideration arising out of a new & distinct (separate) transaction & moving to promisor, i.e. accruing to his benefit, his promise is original.

3<sup>d</sup> - ante. Ex. Mills v. Lessor, &  $\gamma$  Landlord came upon  $\gamma$  land to assist in improvements & rent - I. O. to whom they had even assigned promised to pay  $\gamma$  rent if  $\gamma$  land was not assisted.

He was good - (the Lessor remained liable).

3<sup>d</sup> - ante. But in this case when he gave up in favour of Dept. on his promise to pay.

67. 3 Binn. 7886. 3 Esp. 86. 100. 121. n. Peck. ex. 213.  
3 East 335.

The consideration arises in  $\gamma$  last case of a new & distinct transaction & moving to  $\gamma$  promisor in  $\gamma$  abandonment of lien (wh. was a valuable interest) in his favour. 3 Binn. 1025. Peck. ex. 213.

3 Esp. R. 86. 100. 121. n. 2 East 325.

It was in consequence of  $\gamma$  funds being expended in Dept's favour. The debt was only  $\gamma$  measure of  $\gamma$  sum to be paid like a promise to pay another for  $\gamma$  thing by promisor.

4<sup>th</sup> When one is under a moral obligation to pay for a benefit (The debt was only  $\gamma$  measure of  $\gamma$  sum to be paid like a promise to pay another for  $\gamma$  thing by promisor. (Hobbs v. Lloyds) see L. R. 3 -

4<sup>th</sup> When one is under a moral obligation to pay for a benefit recd by another, a formal promise by 3 former is original & will bind him. Ex. medicine furnished to pauper - the surgeon afterwards promises to pay. 3 promise is binding - not treated as a promise to pay another's debt. Roll. 281. Black. 213.

## 3 Miscellaneous Rules.

(applicable to 3 foregoing cases.)

14 Promise to pay a certain sum in consideration of promisee's withdrawing a suit vs. P. & for "dpt. & bath" has been held binding - for there was no debt due from P. &.

It did not appear that there was any default on his part. 2 Day. 457. 1 Wils. 205.

Black. 213. 7 J.R. 204. Robt. 208. 253.

The promise was not for performance of some duty. P. & was never liable to pay the particular sum promised - or to 1 particular duty, wh. 3 promise was intended to create.

1 Wils. 205. 7 J.R. 204. 2 Day. 457. Black. 213.

Robt. 208. 253. 254.

There must exist vs. a 3<sup>d</sup> person a debt or duty as contained at 3 time of 3 promise to bring 3 present within 3 stat. or one capable of being ascertained. ante 85

But a promise to pay in consideration of promisee's staying a suit vs. P. & for 3 debt is collateral. The debt subsists vs. P. & & no lien or interest assigned or abandoned as in 3 other case by promisee. 2 Noy. 455.

And a promise by 3 in consideration of promisee's abandoning an action vs. P. & 3 promisee's wd. pay 3 damages - is collateral & within 3 Stat.



- same duty - It is to pay & same sum that  
D. is liable to pay, i.e. value of & property.

I suppose & former to be in consideration  
of promise withdrawing & suit wd. it not be  
good in Eng. as retract discharges & D. even  
to bring another suit - so yet J. D. liable  
it is extinguished.

If promise to pay J. D. debts of D. &  
D. release J. D. taken in meane process is  
collateral (L. L. times) for & debt continues &  
J. D. may be arrested again.

Locus (L. L.) if he had been taken in  
final process, & was thus released, for re-  
leasing him wd. discharge & debt.

69. Some have supposed yet when there arises a  
new consideration a parcel promise to answer  
for & debt &c. if another is good whether & consid-  
eration moves to & promisee out of a distinct  
transaction or not & whether & debt is dischar-  
ged or not - as in baron & a rule. 2 Wils. 94.

10 Mod. 232. v. Bull 281. 2. & T.R. 201.

Utia. 875. 2 Bay 457.

But this is not law. The stat. wd. be ma-  
gatory & & rule under it & same as the  
L. L. state &c. for & parcel promise  
wd. not be good at L. L. with a consid-  
& it wd. not be good whenever there is a consid-  
& it wd. have no effect, & tho- & promise  
is in writing it is not good with consid-

3 Brox. 1887.

6 M. 330.

70. If written promise to pay & debt is another  
if he does not, is discharged by promisee

granting forbearance to y debtor. There is a  
tacit understanding yet y creditor is to collect  
of y debtor if he can. Kirby. 397.

A judicial confession by deft. excluding  
y necessity of proof will prevent the op-  
eration of y Stat. Ex. tender of ad-  
vance & money pd. into Ct. for y parcel  
promise is not made void as a promise.  
The Stat. merely excludes y parcel evi.  
to establish it. Peak. R. 15. Peak. ex. 207.  
Rott. 238.

When accordg. to y above rules the  
promise must be in writing to be binding.  
it is not necessary in declaring to void  
yet it is written. It is supt. if it ap-  
pear in Evd. for y Stat. introduces a new  
rule of evi. & not of pl. p.

Rt. 450 Bull. 279. 20 Decr. 7890. Rob. 202.  
2 Chanc. R. 214. n. 2 D. R. 156. 1 Hann. 9. n. 1.

This rule holds up to all contracts con-  
templated by Stat. Coop. 289. 12 Mod. 550.  
3 Bac. 655. 2 Root. 146.

Ergo Semurver to y deor confessor a pro-  
mise, or rather, perhaps it can't be objec-  
ted under y Semur. yet y promise is not in  
writing. 7 D. R. 250. n. 1 Root 77. 8. for there  
can be no evd. of y fact.

Recy of such a contract is pleaded in  
bar of another action - greater strictness is re-  
quired in a bar than in a decr. 2 Wils. 49.



Rayd. 550 Bull 297. Root 202. n.

But it is necessary, in declaring as well as  
in play in law to show a consideration.

A parcel sent to him, the gift of  
another & also to do some other thing, (as to re-  
ceive a watch) is held to be within & a gift.

Robt. 173. n. 231. N. R. 130-; J. R. 201-4. 2 Vent. 223  
4 Inst. 420. 5-

72. 3<sup>rd</sup> contract of 7 3<sup>rd</sup> class relates to agreements in  
consideration of marriage, i.e. family provision.  
These to be binding must be in writing.

Wed. n. p. 280 1 Inst. 197.  
2 Vent. 223. 2 H. 526. 10 R. 11. 618. La. R. 386. 1 Tra. 34. Robt. 190.  
(1 Lev. 65. 511. contra.)

It was formerly supposed that parcel agree-  
ments, were binding, provided they agreed  
to reduce them aft. to writing.

Doc. Br. 400. 2. 4th. 506.

If however there is such a stipulation  
& it is prevented by either party Eq. will en-  
force it.

Robt. 198. 130. 7. 10. 618.

It is thus executed to relieve our friends.

And tho. a parcel agreement, can be enfor-  
ced, it is sufft. on one side to support  
a written agreement, on the other.

Robt. 197. 130. 7. 10. 618. 1 Tra. 226. 2 Lev. 146.

The writing is not required to be in any particular form. 1 Ves. 430 1 Smith. 79. 1 R. 500.  
1 Bos. 287. 8. 30th. 505. 1 R. 140. 105.  
4th letter is sufft.

But it must appear yt 3 other party  
recd. & letter & accepted 3 terms,  
secus no agreement.

Hence where 3 father of an intended wife  
wrote a letter (containing) to his daughter sh.  
was not shown to her intended husband, before 3 marriage.  
9 Ald. 2. R. 192. 1 Bos. 287. 502. 1 R. 50. 1 Smith. 179. 179.

Hence was no agreement.

But a letter written to one's agent stating 74.  
3 terms of an agreement made by parol, is  
held sufft. memorandum of yt agreement.  
10th 92. 9. 30th. 505. 1 R. 121.

And where an agreement is contained in  
a letter, it must particularise 3 terms.  
10th. 12. 1 Smith. 179. 1 R. 50. 1 R. 526.  
1 Bos. 290. 1 R. 106. 191.

4th Clasp - 4th Contracts of lands tenements,  
& hereditaments, or for any interest in or concerning them.

Under this H. it is held, yt where an 75.  
article, (not) annexed to 3 freehold, is sold,  
it is not within 3 Stat. not in contemplation  
of severance.

10th 182. 3 East 602. 1 R. 862.

1 Lev. 65. 1 R. 214. 11 East 362. 1 Com. 74. 80.

Or, trees, growing crops.

1 Bull. 282. 1 Bos. 307. 1 Day 476.

Potatoes are considered annexed but trees not.

for to take them out six weeks 3 freehold 3. 4.

20 to take 3 running gear of a mill.



a parcel agreement, with the owner of land  
to divide the crop is considered good.

103 & Phil. 297.

see 1 Kern. 151. 189. 1 Eq. cons. 19. 100 279. 280.  
formerly held

Op. 20. 770. 1 Kern. 221.

Pr. Ch. 102. 200 Ch. 58

565. 6 Bro. Par. Cas. 45. 100 281-3. 100 17. 157.

In Court. a parcel promise to pay for  
land has been held good.

1 Root 778 579.

There are some cases where parcel agreements  
under special circumstances, may be enforced  
if the agreement is provable consistently  
with the spirit of the Stat.

1<sup>st</sup> When there is no danger of fraud or  
injustice in enforcing the agreement. it is not  
withheld by Stat.

Hence on a bill in Eq. for specific per-  
formance of a parcel agreement, if defendant con-  
fesses the agreement. he is bound by it, be-  
cause here there is no danger of fraud, & no nec-  
essity of proof.

77.

1 Res. 221. 441. Pr. Ch. 208

Am. 586. 2 Br. Ch. 588. 136 R. 600. 344th. 3. 270. 100. 157

If the defendant in his answer confesses the agree-  
ment. & says not pleaded by Stat. it can be en-  
forced.

But tho. he confesses & does plead by Stat.  
it can't be enforced.

Root. 155. 156. Pr. Ch. 215. 4 Kern. 238.

La. Hardwicke says 2. 4th. 155 that where the deft. confesses, even tho he did plead the Stat. & Count id. enforce contracts. 2. 3. 4th. & 3rd. Chy. 208. 374. And where deft. confessed and 2. 3. then pleaded & Stat. the contract was still enforced.

2 Br. Ch. 508. La. Mansfield says 1. 236. R. 600. that a verbal agreement, confessed by deft. is not of the Stat. & La. Thurlow thought 2 Br. Chy. 559. He thinks the only effect of the Stat. is to prevent stff. from proving the agreement. aliunde. 1. Fentb. 170. Hob. 157.

On the other hand in 2 Hen. Blk. 63. it was said by La. Longhorough that if a deft. confessed the agreement, & then pleaded the Stat. it wd. not be enforced vs. him. La. Roslyn & Baron Eyre held the same opinion. 4 Ves. Jr. 23. 6 Do. 5, 8. 2 Br. Ch. 563. 4.

It still remains "questio vexata." 79.

The later opinions are that a contract can't be enforced, where deft. confesses & then pleads & Stat.

1. Fentb. 170. 1. Mitf. pl. 211. Keap v. id. 210. under Stat. where it is so. that it seems to be nearly settled that deft. may admit a agreement, & plead the St.

If, thinks a deft's confession, tho he says, pleads & Stat., takes a case out of & Stat. & if insisting on & Stat. prevents a remedy on the agreement. the rule itself, & a confession takes a agreement, out of & Stat. seems arbitrary & groundless. 2 Br. Chy. 507. And if the Ct. knowing the agreement, tho he by parol, can enforce in one case, why not in a other, - as little danger of perjury in one case as in a other.

It is also a question unsettled whether a deft. in Chy. on a bill for a specific performance of a parol agreement, for the sale of lands &c. is bound to make answer either confessing or denying.

Decided by La. Mansfield that he is bound to answer. 2 Br. Chy. 566. Mitf. Pl. 211. 2. Fentb. 168. 170. contra Roll 150. 7. 2. 4th. 155.

La. Thurlow is of the same opinion, & that the only effect of the Stat. is to prevent the stff. from proving the



agreement. *Whitcomb v. Br. Lin.*, 567. *Northb.* Roll 157.

*Lies v. Mansfield* *Manchester, Gardner & Threlton*, held that deft. was bound to answer & that his confession taken it out of the stat.

*Lords Longborough, Eldon & Thron* were none of the contrary opinion. 2 *Br. Bl.* 68. Because compelling the deft. to answer a parcel agreement. Leaves him under a temptation to commit a perjury. What then? This objection holds equally in every case in wh. deft. in ch. is bound to answer. Perjury by deft. is not wh. the stat. intends to prevent, - it was to prevent self from swearing parcel agreement. on deft. Besides the objection might be urged vs. compelling an answer if an agreement is written in wh. case the deft. is clearly compellable to answer. This question whether the deft. is bound to answer depends on the question whether his answer will bind him or not, - whether his confession will take the case out of the stat. or not. If his confession does not take the case out of the stat. & his insisting on the stat. will avoid him "sui iuris" counsel him to confess or, stat. or. in negatory & indeed worse than negatory to counsel him to answer. *Northb.* 171.

It may be seen in *Eng.* that a party to a parcel agreement. for sale of lands &c. tho. he denies it by answer shall be bound by it if there is a previous confession out of court. 3 *Atk.* 407. 1 *How.* 293. This is the law.

8.

Upon the same principle viz. if there is no danger of fraud or perjury in the proof, a parcel contract for purchase of lands at a vendue sale, before a master in ch. under a decree of the Ct. is binding; for the Ct. have so high an opinion of the character of the Master that they think there is

no danger of their committing perjury. 1 How. 271. 4. 1 Ves.  
218. 20. 1 W. Bl. 289. 1 Br. Chy. 334. Hall 115.

show a parol contract between two solicitors in  
England in a suit between mortgagor & mortgagee was held for same  
reason. 3 Bro. Chy. 334. Hall 115. n.

There are many respectable authorities & it  
is a parol contract respecting an interest in land  
made in a fraud induced from circumstances  
with the danger of fraud. Ex. Sale of land by  
absolute deed, but vendor at execution gives an  
obligation to vendee to pay and of consideration,  
remains in proper. says & takes, does not ac-  
count for profits, pays no rent, & pays interest  
on obligation. Com. 85. 3 Mod. 429. 2 Ves. 376. 2 Atk. 31.  
1 Kim. 108.

Br. Ch. 526. Walk. 60. 21. Riv. 424. 1 P. W. 381. 2 D. 549.  
Whether case on principle of a fraud, made  
to prevent fraud ought never to receive such  
a construction as wd. protect or encourage it.

For act is to be liberally expounded.

1 Fortb. 171. 2. 7 D. 294. 6. 1 B. 11. 2. 600. 1.

Where a parol agreement, partly performed  
on one side at request or with consent  
of other party, will bind other. 83.

Ex. agreement by deed to build a house.  
1 W. 22. 159. 963. 1 Fortb. 172. 1 Ves. 221. 1 Bl. 22. 600.  
2 Vir. 575. 1 P. 295. 1 Tra. 785. 3 Atk. 100. 1 Ves. 83. 297.

1 Root 228. 1 Root. 130. 2. 138. 3 Vir. 378. 5 D. 341.

Otherwise it might take advantage of his own fraud, for  
his accepting or permitting parol performance by B., not  
intending to perform himself, is in itself a fraud.

3 Wood. 37. 1 P. Chy. 501. 1 Br. Chy. 317. 1 D. 29. 2 Pul. 597.

Indeed in such cases the agreement may even en-  
force the terms if it were not precisely settled by the  
parties. 1 D. 297. 2 494. cas. 48. 17. 5 Vin. 523.



Deliverance, & so on. to be in accordance with  
said agreement. it is subject to performance  
on the part of vendor.

289. sup. 48. 1<sup>st</sup> Ver. 305. 2<sup>nd</sup> Ver. 363. 255. 1<sup>st</sup> Ver. in Ver. 16. 5/4.  
1<sup>st</sup> Ver. 747. 3<sup>rd</sup> Ver. 409. 1<sup>st</sup> Ver. 299. 300. 3<sup>rd</sup> Ver. 783.

Payt. of money under consideration of this  
kind, has been held in accordance on the  
part of vendor. & it is stated that when a contract  
is made to be in accordance. 1<sup>st</sup> Ver. 133-5. 2<sup>nd</sup> Ver. 360  
1<sup>st</sup> Ver. 193. 1<sup>st</sup> Ver. 85. 2<sup>nd</sup> Ver. 120. 3<sup>rd</sup> Ver. 2  
1<sup>st</sup> Ver. 345. 2<sup>nd</sup> Ver. 279. 3<sup>rd</sup> Ver. 77-81.  
contra 1<sup>st</sup> Ver. 82-2<sup>nd</sup> Ver. 36.

The prevailing opinion is that payt. of money  
by vendor is not taken out of the contract.  
1<sup>st</sup> Ver. 304. 2<sup>nd</sup> Ver. 282. 1<sup>st</sup> Ver. 221.  
5<sup>th</sup> Ver. 32. 37. because the money may be re-  
covered back in apt. & thus vendor be placed in statu  
quo. there is no need of engaging performance from  
vendor to prevent grant. 1<sup>st</sup> Ver. 304. 34. 3<sup>rd</sup> Ver. 312.  
382. 1<sup>st</sup> Ver. 221. 3<sup>rd</sup> Ver. 37.

85. But payt. of earnest is by all the opinions not  
a contract performance. 1<sup>st</sup> Ver. 304. 1<sup>st</sup> Ver. 185. 1<sup>st</sup> Ver. 37.  
this is not in any sense in part performance, not  
subject to & in performance of the contract. but a mere  
solicitude in making the contract - a form in  
negotiation.

Mr. Wood says that if earnest  
money has been thus paid to vendor now not performance  
and may be recovered by vendor. 1<sup>st</sup> Ver. 318. This is  
intelligible & not correct. The earnest money  
may be recovered back. 1<sup>st</sup> Ver. 37.

And a parol agreement, in part performed by one  
dec in such a way as to bind vendor will on vendor's  
account bind his heir. 1 Bos. 117. 2 Atk. 2. Finch 100.

I don't to take the parol agreement out of the Statute;  
on the ground of part performance the act does  
must be such as to bind the parties claim-  
ing; (see, among others) unless the agreement was executed.

Hence part performance by one of  
the parties will not entitle the other to a decree.

7 Ves. Jr. 341. Robt. 18. 62.

6 Bro. C. Ch. 151. 11 St. 87.

And the act claimed to have been done in 86.  
part performance must, to take the agreement  
out of the Statute, be such as in the opinion of the  
Court will have been done out with a view to  
perform the agreement, otherwise it is not now con-  
sidered as part performance. 1 Ex. 105. 10 St. 100.  
to take a new lease & continued in possession.

This was not more a part executed as to take the lease  
out of the Statute, - lease only remained as in way  
above. 1 Ves. Jr. 378. Robt. 18. 151. 62. 1 Bos. 109.

1 Bro. C. Ch. 202. 11 St. 100. 11 St. 100.

1 Bro. C. Ch. 175. 11 St. 100. 11 St. 100.

Acts preparatory to the conveyance or execution  
of the contract are not sufft. - as giving direc-  
tions for conveyance, - going to view the estate  
conveying a scrivener &c. - These are merely in-  
troductions or auxiliary to a conveyance.

1 Ves. Jr. 34. 11 St. 100. 11 St. 100.

1 Bro. C. Ch. 175. 11 St. 100. 11 St. 100.

1 Ves. Jr. 34.





Robt. 120.1. 3 Atk. 387. 5 Pin. 423. 1 Forth. 188. Plowd. 820.  
2 Atk. 203. 19. cas. 10. 1 Bos. 294.

The case of a marksman 3 Atk. 387. decided  
as to the contents of a deed, & proof of the  
oral agreement being the necessary means  
of proving the fraud. 3 Atk. 387.

So a parol contract of any kind may be  
proved where it is only inducement to an ac-  
tion for fraud; for the action is not  
on the contract. 2 Day 531.

And the agreement is but an instru-  
ment or means by which the fraud is effec-  
ted.

So that proving the agreement is only show-  
ing the manner in which the fraud was prac-  
tised, & thus in effect proving merely the  
fraud itself.

Ex. action for a conspiracy to de-  
fraud 5 Atk. is a sale of land.

The same may be done in case  
of a mistake in execution.

1 Forth. 188. 133. 1 Bos. 457.  
2 19th. 203. 1 Bos. 422. 3 Atk. 387.  
2 Bos. 370. 6 Cr. 12. 6 Cr. 134.



When a written agreement may be controlled  
by a parol one. you may see Jones of  
89. *Chancery*.

It may be controlled by a written agree. may  
by a parol agreement. to rebut an agree.  
ex. of written agreement.  
towards discharge of parol.

2 D. 299. 1 D. 446. 1 D. 294.

This rule is peculiar to Eng.

In England by Stat. 11<sup>th</sup> Geo. 3<sup>d</sup>. "inhabitation  
c<sup>o</sup>pt." lies on a parol lease; & the agreement  
as to rent may be given in evidence to as-  
certain the damages.

1 "evidence" 27.

1 D. 20. 1 D. 82. 1 D. 527.

2 D. 12. 1 D. 1249. 3 D. 578.

1 D. 11. 1 D. 12. 1 D. 335.

It com. has "assumpsit" wd. not be present  
the "subt" wd. - "subt" being considered as the  
major number.

1 D. 11. 1 D. 12. 1 D. 1249. 1 D. 284.

1 D. 12. 1 D. 1249. 1 D. 1249. 1 D. 598.

1 D. 12. 1 D. 1249. 1 D. 1249. 1 D. 1249.

1 D. 12. 1 D. 1249. 1 D. 1249. 1 D. 1249.

1 D. 12. 1 D. 1249. 1 D. 1249. 1 D. 1249.

5<sup>th</sup> Contract not to be performed within one year 90.  
from making. Ex. to do an act 12 yrs. hence.

Holmes Jt. this clause does not extend to any  
agreements concerning land &c. (1000. 276. 17 Am. 189.  
89. R. 327.) because of the sup. cases,  
the preceding clause has made all provisions in-  
tended to be made <sup>as to contracts</sup> of that kind.

And if those contracts were to be performed within  
1 year, they do not be binding.

When 3 performance is to take effect on a  
contingent event wh. may or may not happen  
within a yr. 3 cont. is <sup>not</sup> within 1 yr. & need  
not be in writing. Ex. On 3 return of a ship. - to pay on it's marriage.

3 Burr. 1278. Le. R. 310. 11. 13. But. n. m. 280 17 Am. 306.  
Holt 326. 12 Robt. 186. 3 Fath. 9. Leach. evd. 214. 1 Cl. & F. 280.  
14 Kin. 355.

To or to promise to leave a sum of money to 91.  
promisee by will. 40 is not within 1 yr., because  
not to be performed at a distance greater than 1 yr.  
by 3 terms of it. But. 280. 3 Burr. 1278. Le. R. 316. 12.

And to make 3 cont. binding there is no need of  
contingency actually happening within a year.  
3 cont. of prob. int. Le. R. 317. 3 Burr. 1281. \*  
And even as to these it is held in Com. diff.  
(in some respects see Root 89.)

\*The clause then extends only to contracts wh. ac-  
cording to their express terms are not to be per-  
formed within a yr. Reak. evd. 214. Burr. 1281.

6<sup>th</sup> class of contracts are contracts for goods, wares  
merchandise or 3 value of £10 in ling. & 3 39  
have in Com. it seems not require a distinct  
consideration except 3 3 consideration need not  
appear in writing, 3 bargain only being required to  
be written. 6 East. 307.



Rules applying to 3 foregoing classes.

92. The construction is 3 same <sup>as</sup> at law, 3 which may be diff. & usually is.

1 Entb. 22. 3 Bk. 431. 3 Bk. R. 600.

The intention of 3 Legislative governs both.

The language of 3, in first classes - is <sup>agreement, or some</sup> note or memorandum of 3 agreement, must be in writing.

Ex. a letter written stating 3 agreement is a note or memorandum of 3 agreement.

1 W. 201. 1 Do. 287. 8. 1 Entb. 179. Robt. 108.

93.

2 W. 322. 2 Bro. Ch. 32. 3 Do. 318. 3 Bk. 5.

The terms of 3 written agreement, or memorandum not being sufft. definite, may be made so by reference to some other writing, or extrinsic facts.

Ex. A. agrees to purchase of B. at 3 same price yt C. gave.

3 Bro. 41. 3 B. Robt. 107. 1 W. 330.

2 B. 33. 8. 2 B. 338.

It must also appear yt 3 other party accepted 3 terms, & acted upon 3 offer, seems no agreement.

But when 3 writing refers to something extrinsic, if 3 thing referred to is not sufft. to designate & make 3 contract certain, no bond vid. is admiss. to make it more so.

In 3 thing referred to becomes part of 3 agreement.

1 W. 330. 226. Robt. 108. n.

But 3 term "writing" is used in its most extensive sense, as printing or engraving language.

Thus an advertisement, written or printed is binding. 1 Bk. R. 559. 3 Bro. 1921.

An instrument intended as a deed, but failing to operate as such from some omission or change in the relative condition of the parties may be evidence of an agreement in Eq. & the may enforce it.

Ex. The omission of sufft. attestation in a deed.

Ex. Bond given to wife by husb. before marriage.

But no writing or memorandum can be an agreement. in it imply the privacy & assent of both parties.

Ex. ) Master & Steward.

1 Ark. 497. 2 Robt. 109.

But this agreement. must also be signed by the party,

But the meaning of the word "signed" is to be noticed.

Of Signing.

95.

Not only a subscription or signature at the foot of the instrument, as usual, is a signing, but it is sufft. if the party's name be inserted in any part of the body of the instrument, if intended to give authenticity. 1 Kntb. 167. 3 Ark. 363. 1 Tra. 399. 1 Wils. 118.

1 Bos. 282. 2 Eq. cas. 12. 1 Ves. 6.

Ex. Cont. between A. & B. a deed.

Same rule as to Devises. "Devise" 17.

1 Lev. 186. 9 Hyl. 249.

2 Bos. & P. 238. 1 Gasp. R. 190.

But where the name appearing in the body of the writing is not intended to give authenticity to it, it is not a signature.

Ex. A writing containing the name with instructions &c.



100. W. 771. / Feb. 189. / Row. 285. No. 121.

96. It was once held that if any inspections were made in the instrument, it was a signature, now overruled. 1 Fin. 220.1. 1 Fortb. 103.0: 10. 11. 7.  
1 Nov. 284.

The signature of one of the parties provided  
is known; contents of writing, as a subscri-  
bing witness is binding.

The signers must be by 3 party to be bound  
on his authorized agent.

It is suff. if 3 party w. whom 3 cont-  
-bunding has signed if there is evd. of acquiescence  
of 3 other. - Ex. 94. was an agent. to procure B. to sign it tho he does not. Dist  
9 Dec. 4. 34. B. v. C. 103. 12 Nov & Dec 29. 33. 34. C. Roland <sup>and wife</sup> 171. 155.  
Distt. 115. n. 124. 1 Eq. cas. 20. 22. 321 Rev. 286. 2 Fern. 378.

There are some doubts as to, left rule -  
J. G. does not see no ground in want of mut-  
uality. Robt. 117. n. 124. Supd. 53.  
1. Holy & Legrey 20. & Rowland. 155. 141.

4th & 5th is ss. to be bound if he author-  
 izes B. to sign, & it has been held  
 so if 4th procures B. to sign or induces  
 him to sign, (this last is <sup>now</sup> author. J.T.)  
 129. cas. 21. 100. 287.

But if 3 parts out swimming being a  
bill. vs. 7 parts swimming, a Lt. of Eq.  
will not suffice for 3 Bt. in he per-  
forms what he ought to perform under 3 cont  
1 Tw. vs. 2. Proct. 12½.

It has also been held <sup>condition</sup> that an auctioneer  
subscribing & highest bidder name to <sup>condition</sup> sale is a sufft. signing. for his signing is a  
sufft. signing for both. 1 Bk. R. 588. Bul. n. p. 280.  
9 Bwr. 1921.

But this rule is now confined to 3<sup>rd</sup> class  
of contracts, & no others.

1 Ves. Jr. 349. 1 Ex. R. 107. 1 B. & P. 286.  
Bul. n. p. 287.

(See 9 Ves. Jr. 249, & Robt. 115. in instant.)

But if an interest in lands it seems it is  
not sufft. & T. R. 159. but subject matter  
was 3 years crop of grass, or aftermath or mowing (Ganskie).

But it has been doubted whether sales at  
auction of any kind, are in any case within  
3<sup>rd</sup> class. because, an auction is a pub-  
lic transaction & therefore little danger of  
forgery. 1 Bk. R. 600. 9 Bwr. 1921.  
Bul. 280.

But of this there is judicial decision, no  
direct authority.

The Stat. with respect to exceptions.

if printed name or one expressed may  
be as good a signature as one written.

Ex. bills. made use of in cities  
& large towns. 2 Bos. & P. 298. Robt. 124.

It is not necessary that authority of an  
agent signing for his principal should be in  
writing, & a verbal or parol authority  
is sufft. in a simple cont. but not in a  
cont. by deed in which authority is by deed. "See" 36.  
1. Wood. 522. 9 Ves. Jr. 251.



It is not indispensable that an identical instrument, itself signed, not itself signed, is acknowledged by some other writing, it is signed. Ex. a letter written & signed. See agent. 1947k. 503. 503no. Ch. 918. Robt. 121.

The same writing of an account, by 3 hand of one of party's does not prove its sense with 3 necessity of signing. 10. W. 770 Robt. 121.

100. Of 3 Consideration necessary to support a Contract.

According to 3 definition of a contract, consideration is 3 essence of every contract.

This is universally true in executory contracts & partly of executed contracts.

148 W. L. a contr. without consideration is called nudum pactum. 2 B. & K. 443. 4. Dow. 230.

The consideration of 3 material cause of 3 promise is 3 cause of 3 consideration.

Considerations are of 2 kinds.

1 Good. 9th in consideration of Relatives a natural affection between connexions.

12th 19. 1 Rev. 301. 1 Fortb. 337. 1 Geo. 83 2 B. & L. 297. 34  
1 Warr. 427.

Such consideration (i.e. merely good consideration) is sufficient in a contract executed as between 3 parties.

Ex. grant by father to son.

But not valid vs. 3 creditors or bona fide 3 vend. because every man must be just before he is generous. 2 B. & L. 297.

that an executory contract, upon good consideration 101.  
may be enforced in many cases in Eng. but  
not at Law.

1 Bur. 427. 2 D.R. 156.

1 200. 361. 369.

2. Valuable, wh. is something of security  
value, as money, labor, & marriage

in 31k. 297. 300. 83.

Friendship is a good consideration to support  
a promise w. a Treaty.

1 Burr. 182.

See 1 Bos. 335. 6. 2 D.R. 335. 3.

Contracts under present view are divided  
into two kinds by 3 C. L. - special & simple  
7 D.R. 151.

("as ut res" "facio ut facias")

102.

A special contract is one entered into &  
proved by specialty, i.e. written and  
sealed.

Co. L. 171. 2 D.R. 295. 403.

A simple contract is a parol or ver-  
bal contract or a writ. written but  
not sealed.

2 D.R. 915. 6. 3 Robt. on 4 C. 99. 7 D.R. 151. 20.

By 3 C. L. a parol writ. & one reduced  
to writing & not sealed, is the same.

A writ. in strictness, but not  
sealed is merely evid. of a parol contract.

Hence a pleader can't count upon a writ.  
but upon a parol contract.

Robt. on 4 C. 99. 7 D.R. 151. 20. 2 D.R. 403. 20.



It has been in cont. yet a written contract  
not sealed containing an express promise or cove. are in genl.  
treated as specialties & Eng. law relating to specialties it is  
1872. applied genl. here to written contracts, & to those sealed if they contain

103. It is clear yet an executory simple contract  
witht. consideration is not binding. "ex nudo, pacti  
non oritur actio." 21088. 10292 Bl. 545. Black. 129.

LaR. 909. 247306, 247306, 1862. 1 Dow. 330.5. 5 T.R. 143. 1 Kent. 32.

Ex. If y<sup>e</sup> promise to make B. a present of  
£ 100.

Judge Wilmut l<sup>d</sup>. it down in one case yet  
a written contract not sealed witht. consid<sup>n</sup>. was good.  
This rule is too broad. (J. G.) 3 Burr. 1670. 2 Bl. 546.

But as a genl. rule & direct reverse to  
it is true, from all authority.

Wilmut & Blackstone speak of negotiability.  
7 T.R. 551. n. 121. Doug. 514.  
Kip. n. 116. 1 Dow. 341. Ch. n. 836. 1. 2. 9.  
3 T.R. 421. 757. 1 Fortb. 335. 2 T.R. 71.

Then reducing a contract to writing ergo  
does not supersede necessity of a consideration.

In strict legal theory a consideration is  
necessary even in a specialty.

104. The consid<sup>n</sup> need not be proved  
for it is implied.

And y<sup>e</sup> Dept. can't have at law. The  
want of consideration, for it is pres-  
umed from y<sup>e</sup> solemnity of a specialty.

For if y<sup>e</sup> Dept. denied it he wd. impugne  
his own deed.

2 Blk. 295 1 Dow. 339. } (Burr 1670. 1 Fortb. 334.  
1 Dow. 340. 177. Bl. 546. } \* \* 2 Blk. 546. 1 Kay. 514. 1 Dow. 230.  
L.C.R. 729. 1830

In short a debt. is estopped from alleging  
want of a consideration, because the inst. is a debt.

"Deed" 20 Rev. 342.

105.

But if a want of consid- appeared upon a spec-  
ulation is it binding? J.G. Trusts it is ~~not~~ binding.

In authorities yet bear upon this point see

2 T.R. 577. 3 Burr. 1634. 1 Do. 2072.

7 Co. 40. 7. T.R. 477. 3 Do. 438. 10 Do 368.

These authorities apply to a genl. doctrine rather  
than to a particular pt.

The rule yet a consid- is necessary to cover  
cont. applic. practically to executory  
contracts only. 106.

For a law will not rescind a contract  
voluntarily made executed Dong. 20.1. 1 Do. 228.  
1 Do. 355. 4 Do. 377.

It has often been sd. yet a consideration  
may arise only in two ways.

1<sup>st</sup> From something advantageous to the  
promisor.

2<sup>nd</sup> From something disadvantageous to him  
to whom a promise is made. 1 Rev. 1 Trust. 506.

But this rule is too broad or nar-  
row  
Co. 5. p. 290. 4.

It sufft. consid- may arise from either of  
these two modes, but there are others from wh.  
it may arise.

1. Delivery of goods to J. Stiles to say, he promising to  
— the quantum is immaterial, rep of any  
value whatever, even a bushel corn?

The law, in this instance, not regard proportion. 2 Burr. 215. 2 Rev. 152.  
1 Do. 210. 2 T.R. 518.

107.



of consideration idle & insignificant will  
not support a promise — Ex. not to wink or  
smile in a fortnight. 2 Sp. 54. 1 Do. 555. Bro. C. 20  
It is no consideration at all. 2 Roll 23.

But any act, however trifling, to be  
done by him to whom I promise if made  
in <sup>sufft. consideration</sup> ~~the act~~ <sup>gives an action on promise.</sup>  
Ex. C. 3 apigne of a lease promises to  
pay 3 rent if A. will show him 3 lease, then showing 3  
lease is sufft. consid. 2 Sp. 272. Bro. C. 67. 1 Do. Bro. Car. 70.  
1 Do. 553.

106. And 3 more relation of landlord & tenant is  
a sufft. consideration to support a pro-  
mise from one to 3 other.

Ex. Declaration stating 3 Deft. to be tenant, & yet in  
consideration thereof, he promised to carry away from 3 land, straw  
&c. 5 J.R. 575.

2. But a sufft. consid. may accrue from  
something disadvantageous to the person  
to whom I promise is made.

Ex. A. having a bond w. B. delivers it up to be  
cancelled on C's promising to pay 3 contents.  
1 Do. 544-8 - Bro. C. 128. Hobt. 4. S. Bro. C. 542. Bro. C. 74

A contract upon a consid. already made  
& executed is not binding.

Ex. In consid. of having bailed my servant.

If A. has discharged B. heretofore from a bond  
& B. in consequence of that release, after  
wards promise to pay him this promise is  
not binding, for there is no disadvantage  
to either party.

Plod. 5. 302. Do. 558.  
2 Sp. 87. 55. Bro. C. 885. 742. 1 Roll. 11.

But where a part is thus paid & executed  
& another part subsisting & accruing it is  
good.

2 Bulst. 72. Cro. E. 94.

1200 349.50. Cro. Car. 409. 3 Hall. 96

Because wh. remains is a sufft. consid.

But a sufft. consideration may arise from  
neither of these two former ways, i.e. from some-  
thing diff. from them.

4203 rule yet a part will not  
support a cont. is now somewhat relaxed. 290. 4. 4 Tra. 955.

3 Burr. 1671. 2.

Thus a contract upon a condition completely  
paid is good, if there is a previous 109.  
legal duty to be performed in part of  
promisor.

Who when at. had been at expense of  
burying son of B.

In in Eng. it is made a legal  
duty for every father to bury his son.

1200. 350. 1. 1 Leon. 198. Rayd. 260.

Cro. E. 138. 3 Burr. 1671. 2.

If there was a <sup>trivial</sup> obligation on the  
promisor, promise is binding.

Ex. of promise <sup>may</sup> be a just debt.

barred by Stat. limitations.

Who when overseers of poor, promised  
to pay for medicine previously furnished to a pauper.

1200. 351. Black. ex. 213. 355. Rayd. 255. 3 Bul. 137.

20th. 345. Cro. Car. 290. 4

The putative father of a natural child makes  
a promise



Consideration supported with support a contract if a consideration accrued at a request of a promisor.

1 Gent. 550. 2 Wils. 95.

2 Vent. 268. 3 Black. 407. 4 Hutt.

1 Bull. 120. 1 Pore. 352. Bro. 404. Bro. 18. 18. 18. 18.

on the cont. the subject, complies itself with a previous request & relation & operates as if made at a time of request.

It has been held that a mere stranger to a meritorious act, one by another person, can't sue, not an ~~transmission~~ action in his own name on a contract grounded upon it.

Hence if a. in consideration of B. will release him of a trespass costs to pay C. a sum of money, & it is B. can't sue upon a promise. 8 D.R. 570. Bro. 682.

2 Roll 441. 1 Chit 222. 1 Pore. 353. 1 Vent. 6

This rule is now held to hold only as to third "inter partes". 1 B. & P. 148. n.

1 Lev. 225. 1 Gylr. 21. Bro. 729. 1 Lev. 129. 1 East. 77.

When a agreement is a parol contract it can be settled by a later authority that B. persons may maintain the action. 1 Bro. 214. 1 B. & P. 148. n. 1 Do. 101. 2. 1 Pore. 140.

1 D.R. 639. 8 Mod. 117. 1 Bro. 333.

And where a cont. is parol a D. person may sue upon it as if a promise were made directly to him. 1 B. & P. 101.

And a consideration moving from one person will support a promise in favour of another who is nearly related to him. 1 Vent. 318. 332. 2 Lev. 210.

1 Bro. 302. 1 Pore. 353.

Ex. promise to A. in consideration that he D. perform a work to pay his daughter. But no such relation is now necessary, so that a promise is good in favour of a stranger.

Forbearance to a suit is a good consideration. But this must be attended with two requisites  
1. Either legal (i.e. actual) or a fixed debt

2. It must be an action in which a promisee or person claimed to be liable is chargeable, or in wh. at least there is a colorable liability on his part. *Ins. Co. 206. Esp. 75. 1 Bos. 353.*

Of 7<sup>th</sup> 1<sup>st</sup> - First - C. C. Promise to pay a debt in consideration of a debt. (i.e. obtain from being a time being limited) & if forbearance not being expressed to be perpetual is not good. The promisee might sue next day. *1 Bos. 283.*  
*Ex. C. 19. 455.*

But a promise to forbear a yr. or a reasonable time is a good consideration. C. C. are to judge what is a reasonable consideration. *ib. ant.*  
*Esp. 95. But. 108.*

Second. Promise by another to pay a debt. If the son who says dead is debt. & forbear to sue her is not obligatory. There is no consideration. She was not liable. Forbearance is no favour to her, no disadvantage to promisee, & there is no moral obligation to pay.  
*3 Vask. 90. 1 Bos. 554. 5 Hard. 73.*

If one is arrested on word process & another in consideration of his release promises to pay &c. he is not bound - there is no consideration. The release is only from false imprisonment. *1 Bos. 555. 5 Esp. 94. Hard. 73.*

If a promise by A. to pay B's debt if C. creditor will accept of A. as his paymaster & will forbear to sue A. for 6 months is not good even at C. L. for he might sue B. immediately - supra no prejudice to C. creditor. *Bos. 550. Hard. 73.*



But a promise in consideration of forbearance  
a suit is good if there is a good colorable  
ground for a suit. C. G. Sugrout, having  
bought silk & velvet, died. His exec in con-  
sideration of forbearance promised to pay.

This is good at C. L. for there was  
113. colour in a suit the being ex.

24. 272. 100. 386. Latch 142.

When a promise is in consideration of for-  
bearance of a suit originally occurring vs.  
promisor himself, the moral cause of action  
is not to be inquired into. It is acknow-  
ledged by 3 promise 100. 387.

But 3 rule can't hold if trust is at stake  
appear in 3 decln. yet 3 suit forborne was for-  
feited. 100. 388.

The Rule I think must be confined to  
cases in which for aught there appears by the  
terms of 3 cont. there may have been a good  
cause of action.

The more act of interesting sup<sup>d</sup>. with  
another or his undertaking to do something  
respecting it is a sufft. consideration.

C. G. Delivery of money to be delivered over to  
another with reward. 2d. Rayd. 909. 10. 20.

"Bailmt." 73. Bro. J. 687. 520. 143. Vask. 26  
100. 384. Com. R. 133. 500. 11

The preservation of 3 honor & peace is a gen-  
ally has been holden a sufft. consideration in  
C. G. Sugrout. between Father & Son & a  
natural child to prevent family disputes.

100. 382. 14th. 3.

The compromise of a doubtful right has been  
held sufficient in Chy. 1 Bos. 163. 1 9th. 10.

Ante 17. 1 Fern. 4. 2 Vent. 353. 2 Ky. 284.

1) Not necessary in contracts, yet consideration is ex-  
pressed in direct terms as a consideration.

Sufft. if one can be collected out of the whole  
agreement. 1 Bos. 168. 4 Ky. 450.

E.g. agreement to settle bounda-  
ries between Mr Penn & Ld. Baltimore,  
held good by Ld. Hardwicke.

But if an express consideration appears  
upon the face of it, a better opinion seems  
to be, yet no other can be implied.

"Expressum facit cessare tacitum" Dec 21  
2 Co. 40. 1 Bos. 168.

Contracts when distinguished with ref-  
erence to the form of consideration may be  
divided into three kinds.

1<sup>st</sup> Where that wh. is stipulated on one  
side is in consideration of performance of  
wh. is stipulated on the other.

Here the considerations are termed mutual.

E.g. A. agrees to pay B. for doing  
a certain act. Here the doing of the act by  
B. is a condition precedent to his right  
to the paymt. 1 Bos. 357. 1 Fe. t. 177. 24.

3 Hall. 95. 1 Holt. 106 - 12 Mod. 460.

1 South. 880. 1 H. Bl. 274. 57. any do. 2 Co. 10.

1 Q. R. 240.

If he sues for the price he must aver per-  
formance, 1 T. R. 780. or wh. is equivalent a  
tender or that he was prevented by Deft. 1 T. R. 688.  
655. Ld. R. 686. Doug. 259. Vtra. 1236. 5 Com. 50. 1 Rob. 433.

"Bldg. 20" "Tender -



Or as y case may be, that he was at the  
place ready to perform & deft. absent, & he  
was thus prevented from performing.  
2 N.R. 240. 1 East 203. 8. 619. 7 T.R. 125. 1 Tra. 458.

2<sup>nd</sup>. Where performance on both sides is  
to be concurrent, then neither can com-  
pel y other to perform till he has per-  
formed his part or done wh. is equivalent  
i.e. offered &c. or is at y place appointed,  
ready, y other being absent. E.g. 98.  
promised to deliver B. a load of wheat on  
such a day for such a price. 2 N.R. 250.  
1 Lamont. 250. 5 Com. 50. 1 East 203. 619. 629.  
7 T.R. 125. 1 Talk. 171. 112. 3. Doug. 659. 65. 68.  
4 T.R. 761. 1 H.B. 102. 8 T.R. 366 1 Tra. 535.

If a place is appointed for performance  
it is sufft. yt. plff. was there ready, & deft.  
absent - no tender is necessary in such case  
to entitle y plff. to recover. 1 East 203. 8.  
7 T.R. 125. 1 Tra. 458. 1 Talk. 113. 4 T.R. 761.  
Doug. 508.

If deft. was to perform on request it is  
sufft. yt. plff. was ready & requested, & deft.  
refused. 1 East 203.

115. If then y agreement. was yt. one shall do an  
act, for doing wh. y other shall pay, y doing  
is a condition precedent. but if according to  
y terms of y contract y money is to be pd.  
on wh. is to arrive, or may before y act can be  
performed y doing of y act is not a condition  
precedent.

e.g. promise to pay such a sum for a year.  
labour or for building a ship. The money contract.  
to be pd. in 10 days. 1 Pland. 320. a. b. 116. 4.

1 R. 68. 2 N.R. 240. 1 Fortb. 381. 8 Mod. 42.

1 Dow. 358. 1 Hallk. 171. 7 Co. 100 b. 1 Kent. 142.

2 H. Bl. 389. 6 T. R. 572. 7 ib. 130.

So if in y last case i.e. where a day is  
fixed for payt. no time is fixed for perfor-  
mance on y other side. Pland. 320. 2 R. 235.

In both cases if y amt. is not pd. at the  
time appointed for payt. y party promis-  
ing it is liable whether y other has per-  
formed or not.

But if y day appointed for payt. is to  
arrive after y time fixed for doing the act,  
performance of y act is a condition precedent,  
& must be averred in an action for y money  
1 Dow. 358. 1 Hallk. 171. 350. 95. (24. 76. 1 R. 1145. contra)  
1 Pland. 320 b. 2 N.R. 240. b. n. 12 Mod. 462. 1 L.R. 688.

3<sup>d</sup> But where y promises are mutual 116.  
or independant i.e. where y promise on  
each side is y consideration of y promise  
on y other, performance is not a condition  
precedent on either side, either may sue  
witht. averring performance. 1 Dow. 354. Long. 685.  
1 Kent. 177. 2 Pl. Abst. 88. 3 Bulet 187. Hard. 102.  
1 Hallk. 24. 5 Mod. 44 &c.

I say in Eq. - then y P'tff. must aver  
performance tho y cont. are mutual, oth-  
erwise Eq. will not interpose, its interposi-  
tion being discretionary. 1 Fortb. 383. 7 B. 10. 8. C. 185.  
Finch 445. 2 Freeman 35.



if  $\gamma$  agrees, is in this form I promise to  
pay \$100 you transferring stock to me & c  
converso,  $\gamma$  promises are not mutual & neither  
can compel performance, till he has per-  
formed. Hallk. 112. Hutt. 633. 1 Fonth. 383.  
12 Mod. 500. 1 H. B. 270. 1 P. R. 761.

See - as to  $\gamma$  case in B. R. 1312 vide 8 T. R. 372-5.

When  $\gamma$  cont.  $\gamma$  goes to only part of  $\gamma$  consid-  
eration on both sides & the breach of one  
may be  $\gamma$  in damages, it is independent.  
1 Haund. 320. b.

See. will action lie in  $\gamma$   $\gamma$   $\gamma$  has per-  
formed in fact? 1 Haund. 320. c. 6 T. R. 370.  
1 H. B. 273. R. 8 T. R. 240. b. n.

117. The question whether promises are mutual  
or independent is to be determined by the  
meaning & understanding of  $\gamma$  parties to be  
collected from  $\gamma$  spirit of  $\gamma$  agreement. &  
 $\gamma$  nature of  $\gamma$  cont. i.e. from wh.  $\gamma$  intent required  
performance. Long. 663. 1 T. R. 645. 7 T. R. 130.  
2 N. R. 232. n. 6 T. R. 570. 666. 8 T. R. 373. Clark. 171. 1 Haund. 320. a.

When  $\gamma$  promises are mutual i.e. independ-  
ent it is no bar to  $\gamma$  action y<sup>t</sup>  $\gamma$   $\gamma$  has  
not performed his part. Each may have  
a cause of action vs.  $\gamma$  other at  $\gamma$  same  
time. Long. 663. 2 Burr. B. 1312. 1 Fonth. 382.  
2 Ld. 41. 14. 16. Bowb. 56.

The Eng. Cts. have leaned of late to  
considering promises independent. 4 T. R. 761.  
8 T. R. 371. Gross J. argu. 11 T. R. 496. 1 Exp. 619.

Mutual promises must both be binding or 118.  
neither will be so, i.e. if cont. must be of  
such a nature & in such terms as will  
bind both sides, & both must be made at the  
same time, seeing that are nuda pacta.  
1 Bos. 360. Hallk. 24. 456. 88.

Are not 3 terms of 3 rule rather too  
strong? for a voidable agreement, by an infant  
will, tho. it may be avoided.

I shd. say of such a nature as <sup>may</sup> bind both.

It C. L. fraud in 3 consideration of a con. 119.  
tract by specialty does not in genl. vit-  
iate it, as in 3 quantity or value of the  
consideration. C. L. Bond for 3 price of an  
unsound horse. Tho. fraud in 3 exch. does  
asent wanted in 3 second case not in the  
first. C. L. deed falsely read, wrong  
instrument. substituted by artifice.

Case of "marksmen" page 88. 2 Bl. 304. 2 Co. 39.

1 do. 27. 2 Lev. 422. 2 Bos. 145. 2 D. W. 203. 3 do. 290.

And yet it is sd. yt fraud  
avoids every kind of act. Bur. 595. 4 do. 2239.

5 do. 2099. Mats. 280. 3 Co. 77.

Now is this to be understood.

120.

But Chy. will relieve vs. contracts of any  
kind for fraud in 3 consideration, because  
they adopt 3 relief to 3 circumstances of 3  
case, wh. a Ct. of Law can't do.

It L. 3 party defrauded must resort  
to his special action for 3 fraud, & such  
appears to have been 3 genl. rule in rela-  
tion to contracts executed withl. deed as in



sales of goods under false representation of  
soundings &c.

But the rule in the last case is much re-  
laxed by late decisions. See Treaspass on  
the case 17 - fraud may be proved in miti-  
gation of damages. 1 Camb. 29, 190.4.

8 John. 433. Peak Co. 233. 4 Esp. 233.  
4 Esp. R. 95.

Does it now hold at all in the case of  
simple contract? It does not. (Judge Gould). It  
is confined to specialties.

In one case however the Ct. of B.R. seems to  
have considered fraud in the conduct of a contract  
as a good defence. The circumstances of  
that case were peculiar. Perhaps other  
points influenced the decision. S.T.R. 438.

But our Cts. have held that a total fraud in the  
conduct of a note or bond i.e. where a prom-  
isor has received & to receive nothing is a good  
defence. S.C. Georgia land frauds & says that  
in such cases relief can't be had in equity if  
the instrument is in suit at Law. Root 38.505.

121. Cases where the fraud is partial. Here, relief  
is in equity. In Cts. of Law must give judgment for  
the whole amt. or for debt. They can't apportion.

But according to our rule the fraud is total,  
yet if the obligation is not in suit or if all the obligations  
are not in suit relief may be had in equity. Thus the  
promisee would remain in possession of all the promisee's  
thing a suit at Law.

## Interpretation of Contracts.

122.

The object of constraining contracts is to ascertain  
the intent of 3 parties & 3 contract however ex-  
pressed and be carried beyond that intention.

1200. 370.

Thus if A. grant that he pay B. \$10 per ann. B. may  
distress for it on A's manor, a writ of annuity  
will not lie for it because there is no grant  
for an annuity in rent. 1200. 371. Co. Lit. 146.7.

But it is a good rent charge for wh. B. may dis-  
tress, for 3 manor is charged for 3 distress.

1200. 371. Co. Lit. 146.7. 2 Roll. 425.

Contracts are to be carried to 3 full extent intended;  
if 3 words can be so construed as to effect it.  
e.g. trust created to raise money out of 3 profits of  
an estate carries in 3 a right to sell if the  
sum can't otherwise be raised within 3 time. 1200. 372.

Words are to be understood according to their 123.  
ordinary & best known signification, in there  
are decisive reasons to 3 contrary. ex. "Mum's Law"

Thus if A. agrees for 20 lbs. of Ale he is not to  
keep 3 lbs. after 3 Ale is out, in 3 Ale is not for  
exportation. Pop. 33. Co. Lit. 186. 2 R.R. 213. 1200. 373.6.

2 Flood. 189.

Decus of an agreement for a shhd. of wine. vendee has  
3 hhd. - for such is 3 understanding of 3 parties  
such is 3 usage. 1200. 86. 1200. 374.

Is a lease for 12 months is for 48 weeks only i.e. 12  
lunar months. But a lease for a 12 month is for  
an entire year, so understood by 3 parties.

2 Bl. 141. 6 Co. 61. 1200. 375.

ex Bl. exch. 86  
{ contra goes by L. Merchant. -



124.

Words expressive of quantity are construed as understood at the place where spoken or used. E.g.,  
Rounds, Bushels &c. 18<sup>th</sup> & 18<sup>th</sup>.

Ques. if to be delivered at another place?  
I am inclined to think it must be construed at the place of performance, tho. I find no such rule except as regards denomination of money.

If it will hold as to money I see no reason why it shd. not to other cases.

But if money is made payable by cont. at a place named its denomination is to be understood according to their import when it is made payable.

E.g. Cont. in London to pay £100 in Dublin - the sum to be pd. in Irish currency. 2 P. W. 88. 690. 1 Dow. 407.

If the language is ambiguous the intention may be inferred from the subject. Its effect is 3 circumstances.

1 Dow. 376. 7.

1<sup>st</sup>. From the subject.

E.g. Cont. for quiet enjoyment. extends not to tortious entries: for the intention is inseparable from the subject is merely to guarantee vs. higher title - guarantees only a right to quiet enjoyment. Cro. E. 212. 13. In. J. 125. 1. 400.

8 Co. 910.

42. 2. 519. 3 Co. 589. Esp. 273. 301. 4 Co. 80.

125.

Grant of common out of all my manor, grants not common only in my commonable places not in my garden &c.

Who grant of all trees growing on  
my farm does not include fruit trees grow-  
ing in my garden if there are other trees  
growing on my land. Bow. 377.8.

No word necessity "in res magis &c" an in-  
strument may be construed & take effect as if it  
were in form & structure an instrument of a gift.  
species. E.g. Feoffment or grant by Lt.  
tenant to his companion operates as a release,  
a court never to sue a debtor operates as an  
acquittance. "Edw. 19" 2 Blk. 6. R. 187.  
2 Barend. 96. Bro. E. 352. Nalk. 574.  
3 Salk. 298. 1 2 R. 146. 3 Co.

## 2<sup>d</sup> From the effect.

Thus if construing a cont. accord-  
ing to the ordinary meaning of words will ren-  
der it ineffectual or frivolous a gift. sense  
may be put upon them. E.g. Recd. 870. 2 R.  
I promise never to pay. 1 Leon. 211. 1 Bro. 282. 3.  
Bro. E. 225. 2 Blk. 155  
1 Kent. 222. Gray. 14.

So when words of condition are used in limit-  
ation of estates. 2 Blk. 155.

So if an annuity is granted for instanc. 128.  
tong or for some other service to be done, the  
grant is conditional tho' not so expressed,  
for otherwise the grantor so. he witht. remedy.  
1 Bro. 287.



13<sup>th</sup>. The circumstances attending a transaction may be considered to explain a contract wh. might otherwise be doubtful or be construed vs. the intention of the parties.

Thus if A. wants an amicus to B. pro consilio impendendo it shall be intended to mean B's professional counsel. Counsel in L. is a lawyer.

If one having goods in his own right & also as exec. grants all his goods & grant is construed to include his own goods only.

1 Mod. 205. 278. 1200. 588. Com. 6. 705.  
Lit. sec. 555. 7.

12<sup>th</sup>. It is then there is a recital of a particular claim in a release followed by genl. words of release & latter are qualified & restrained by former  
E.g. A. had a judgment on bond vs. B. for £1000. B. gave A. a legacy of £5 & died, A. on receiving £5 executed to B. a receipt a release acknowledging & receipt by B. & concluding with genl. words of release viz. "all demands vs. him as exec. & debt is not discharged." - Hobt. 74. 3 glo. 277. Le. Rd. 663.

1 Eq. cas. 170. 3 glo. 277. Est. 243.

Bro. 4. 170. Barth. 119. Le. R. 255.

This applies only to release & is allowed because "all demands" have become matter of form - are used without consideration.

Meaning where a receipt of a particular sum is acknowledged & no particular claim recited.

E.g. £5 in full of all demands.

1200. 13. Barth. 119. 3 glo. 277.

If <sup>applying</sup> after these rules & intention remains dubious 128.  
& contract if <sup>it</sup> be construed most strongly in  
party bound. E.g. Grant. v. Brown. &c. The words are  
his. he shd. have explained himself. 9 Co. 7. b. b. c. 197. a 209.  
1200. 395. Flood. 190. 161. 171. 289.

But there is an exception to this rule, where  
there is an ambiguity in & condition of a, pen-  
al bond, here & construction is in favour of  
obligor, for & condition is intended for his. 5 Co. 22. a 28. b.  
benefit. 1200. 397.

Thus if one is bound in a penal bond  
to pay money at a certain date or date  
& there are two parts in & yr. & it name & money  
is payable at & last, not at & first.

Exception also where & application of the 129.  
verb. rule wd. so injure to a 3<sup>rd</sup> person.

Thus if test. in tail make a lease (Co. in 42. 1200. 400.)  
life not express for more life & life of 3 years shall be intended.  
If by test. in fee. it shd. be for life.

Subject to these rules & terms of a con-  
tract to be construed in their most com-  
prensive sense. E.g. Claims of "all men" claims of "all persons".

An indefinite expression is construed only as an universal one. 130.

When legal language is used it is to be  
taken according to its legal acceptation.

E.g. Limitation to one heir as long as he pays such an  
annual sum, extends to all his heirs successively.  
"Munic. Law".

As to a court. to satisfy after a request  
& one proof, all moneys or emoluments,  
& eventual apprentice - Judicial proof is intended i.e. proof  
made in an action w. & apprentice. 219. 1200. 405.

Contracts are to be construed according 131.  
to & genl. intent upon & face of them, rather  
than according to any particular intent in-  
consistent with & genl. intent. 1200. 401. b. c. 3. 5. 6.



Where a thing stipulated to be delivered  
or some if not, & value of thing at  
time fixed in agreement is a rule of dam-  
ages.

1 Dow. 508. 1 Kern. 217. 1 Eq. cas. 22.

2 Barr. 1010. 1 T. 406.

Exception if a thing to be delivered has  
advanced, after a time to be delivered, in va-  
lue the value at a time of trial is a rule.

2 East. 211. 2 Kern. 395. 1 Dow. 509.

But if a article sold decline in price & stuff  
is not to be affected by this decline. it is

132. Where several deeds or instruments are made at  
a same time between same parties, res-  
pecting a same subject-matter they are  
all considered as made at a same con-  
tract, & are all taken together for a pur-  
pose of construction. E.g. Absolute deed with  
a defeasance separate makes a mortgage.

### (7) Annulment Discharge & having Contract.

Till a term of a contemplated contract are acc-  
epted on both sides a contract is not consum-  
mated & either party may retract.

E.g. Bidding at an auction a bidder may  
retract before goods are knocked.

But an offer on one side accepted by other becomes a contract, (&  $\gamma$  moment) so  $\gamma$  it either by tendering or performing according to  $\gamma$  terms of  $\gamma$  agreement. may bind  $\gamma$  other. 203<sup>d</sup>. 557. Inst. 41.

Thus if C.F. offers B. £20 for a horse &c. -

Also if, on, an offer accepted, consent is paid  
or if a future time is fixed for performance, cont. is  
complete & is properly bound.

So too if an offer accepted, a given time for performance is fixed & case is the same.

1000000. 12. 23. 63. 236. 257. 8. 189. 42. 79. 64.

But if an offer made & accepted nothing more is done, & 3 parties separate, with a pointing a future time to perform, & contract is waived by both parties.

But is not waived if earnest is so. Je-  
tune time appointed &c.

2. H. B. 316. 1. <sup>6</sup>ed. 236. 1. <sup>6</sup>ed. B. 2. 363. 2. B. C. 747. 2. <sup>6</sup>ed. 302. 9.

To If A. agree to sell certain goods to B. 134.  
provided B. within a certain fixed time elects  
to take them, & B. does ~~not~~ so elect, still  
A. is not bound, for there was no contract at first, the  
agreement must bind both or neither. 5 D. 633. (1 D. 261 contra; not law.)

These Rules apply to the completion of a contract.  
But a contract already perfected, but not  
executed



Words expressive of quantity are construed as understood at 3 place where spoken or used.

E.g. pounds weight &c. 7 Dow. 576.

Is it to be delivered at another place? I am inclined to think it must be construed at 3 place of performance, tho' I find no such rule except as regards denomination of money. If it will hold as to money I see no reason why it shd. not as to other cases. (The above is wrongly inserted it shd. have been on 3 6<sup>th</sup> page back, wh. see. ~~and~~.)

Before a right of action has accrued on a simple contract 3 parties may rescind it by merely expressing their mutual dissent, for there is no consummated right destroyed by it, Mutual assent is withdrawn before either can make a claim vs. 3 other. vide "Assump<sup>t</sup>" 59.

Dow. 572. 4 Bosc. 205. Bro. & C. 583. Law. 579. 130.

2 Lev. 144. Com. D. Plar. 27. Hutt. 234.

But after breach it cannot be discharged by agreement. without a release by acts, or there is a new agreement substituted & executed i.e. an accord & satisfaction. Here then if a right consummated & 3 question of assent is at an end.

Dow. 572. 5 B. 12 Bosc. 578. Bro. & C. 584. 2 Bosc. 44. 259.

Watts 204. 11 B. 453.

Recusd up to 3 acceptance of a bill of Exch. & acceptance may be discharged by general assent bill is, payable. This seems to be a positive rule of 3. L. J. 1804. 11 B. 47.

Comp. 355. 247. 15 B. 474. 118.

But an agreement may in fact be raised by long omission on both sides to execute a claim under it. E.g. an agreement between 2 parties to enclose a suit of a common record on 20<sup>th</sup> Nov. There is a presumed abandonment. 15 B. 113. 118. 119.

\* 2 *Eq.* *acc.* 207. 2. 9. 117. 25. 2 Br. P.C. 116. 1      3 *Eq.* 24. 4. 117.

fulfil & represent. 1200, 522.5, 1412. 259.

$\frac{1}{2}$  east. 1/5, 3 1/2, 5.2. 1 1/2, 2. 5/1.

max. 1/4 (not less) Du - What night trans. 1. 0.?

137.

ing destroying or cancelling  $\frac{1}{2}$  instrument. 1 Dec. 1861.



If he who is to be incipitied in 3, for-  
surance of a cont. prevents its being execu-  
ted it is dissolved & rather 3 other party is  
discharged, but 3 party preventing is still  
bound to perform his part.

And in such case 3 party who was to  
perform is in 3 same conditn. as if he had  
actually performed. E.g. 99 contract to  
build a house for B. for £100 B. prevents  
him from building. He may recover £100.  
Common. Law. Lit. 20.6.

138.

Ho if A. makes a feoffment to B. with  
condition yt it shall be void on A's, pay-  
ing £100 to B. on a certain day, & on that  
day B. 3 feoffee is out of 7 realm, so that  
A. can't tender, & A. may reenter as if 3 money  
had been pd. (Bro. 6. 577. 817. Bro. 7. 579.

Ch. 20. 62. 1 Pow. 424. 1 Burr. 9. 11

Qu. Will not 844. consider A. as trustee  
of 3 money for B.?

A cont. may be annulled by a new cont.  
of a higher nature for 3 same thing merge  
E.g. A sample cont. merges in a bond. This  
a feoffment. - for 3 object is not to furnish a two-  
fold remedy but to substitute a higher one.

1 Bro. 21. 123. 1 Bro. 25. 1 Bro. 26. 134. See "Assumpsit 33"  
Hall. 155. 1 East 251.

Recy it is so, if 3 bond is given by a stran-  
ger. It is only additional security not a  
substitute. "Assumpsit" 54.

1 Pow. 428. in the margin. See 13. 2.

And a cont. of a given degree can't be 139,  
extinguished by a new one of same degree,  
i.e. & latter up a new contract is no bar to  
an action on former & latter can't merge  
former.

1 Bosw. 9. Cro. E. 514, 517. Cro. J. 539.

\* 16 L. 336, 02. 1 Bosw. 424.

But when pleaded by way of accord & sat-  
isfaction & first may be barred. 1 Sel. 136.

Offen. 426. 5 East 234. 2 T. R. 25. 3 East 281

In this way it may discharge original  
cont. & Co. 117. But it is & satisfaction, it  
defeats & not & new contract.

But a contract of a lower nature is in-  
scribed in one of a higher merely by way of  
recital or to corroborate it & enlarge & rem-  
edy, it is not merged. B. G. the bail's  
goods by deed i.e. takes a deed as evd. of  
cont. of bailmt. Dolman lies on action on the  
deed. 1 Bosw. 945. 218. 1 Ball. 118. 2 Bulst. 236.

How & simple contract is  
not intended to be turned into a specialty.

The latter is designed only as additional  
security, not as a substituted one & may  
be used as evd. in an action on former.

"Hampstead" 70. 58. 1. 3. 9.

Contracts by deed can't be annulled or dis- 140,  
charged by parol "eo ligamine quo ligatur".

Doe, 120. 6 Co. 44. Yelv. 192. Cro. J. 253.

1 Lamsd. 291. n. 2 Wils. 86. 376.

Or by writing in sealed.

Or by merely delivering up & instrument to  
be cancelled to & obligor. & if obligor again requires



possession of it. 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

Even payt. or acc't & satisfaction of a bond  
is not a discharge, tho' payt. of 3 money  
one upon it is sufft. 7 M. 141.

1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

This distinction appears to relate only to 3  
form of pleading. (L. G.)

To accord & satisfaction of 3 damages occur-  
red on a contract is a good discharge of 3 dam-  
ages. 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

141. When 3 right & obligation created by a con-  
tract unite in 3 same person 3 contract is  
discharged at L. 1 W. 42.

L. G. obligor becomes ex. or admr. to  
obligee. 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

To if 3 obligor marries 3 obligee 3 covt.  
is gently annulled by 3 legal unity of 3 par-  
ties. See "Husb. & Wife" 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

It does if a bond made in contempla-  
tion of marriage to be executed or performed  
after 3 determination of 3 coverture. 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

Contracts may also be discharged by acts of  
3 Legislature. L. G. a covt. to do an act after-  
wards, prohibited by St. "Banc. L." 1 W. 42. 1 W. 43. 1 W. 44. 1 W. 45. 1 W. 46. 1 W. 47.

Do by 3 act of God. E.G. Trees roots to leave 142.  
all 3 timber trees growing & they are blown down  
down by a tempest. 11 Jtho. 268. 1 Co. 98.

May. 31.

Do if 9th. hails a horse to B. to be returned &c.  
& horse dies by disease with- B's default.  
Bailor is excused. His cont. is discharged.

Palma. 548. 1 Co. 447.8.

Do if 9th. contracts to serve B. a year for a  
sum to be pd. in 4 yrl. instalmt. & B.  
dies after 3 first instalmt. & before 3 last.  
B's exec. is not liable for 3 last.

But a cont. becoming partly impossible  
must be performed "ex. res" "Munic. L."

Do if one is bound in a bond conditioned to  
convey land by a certain day & dies before  
3 day. The penalty is saved, tho. Ex. will  
decree a conveyance vs. 3 heir. 1 Co. cap. 18.

But 3 act of a 3<sup>d</sup> person can't regularly 143.  
vary a cont. E.G. Bond by 9th. to 3<sup>d</sup> condition  
that 9th. shall appear in an action in 8  
days notice & judgment is vs. him. 9th. is not  
bound to satisfy it. 1 Co. 451.

The when 3 cont. is by 3 terms of it to take  
effect or to be annulled or varied by 3 act  
of a 3<sup>d</sup> person. His act will operate upon it  
as provided in its agreement. E.G. contract



to buy propy. at such a price as J. D. shall  
name & parties are bound by his decision  
& if he refuses to set a price, & cont. becomes  
void. 1800. 415. 60.

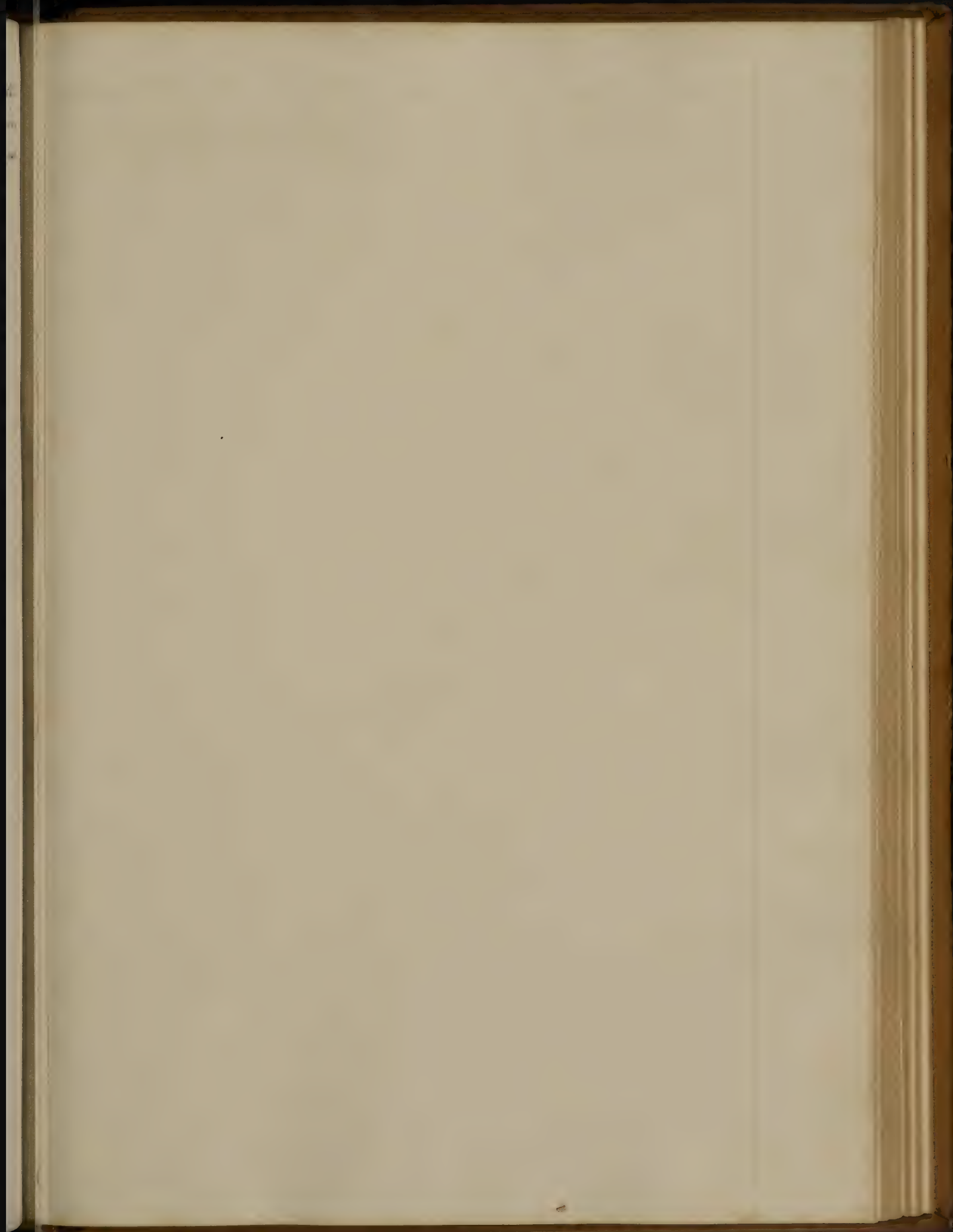
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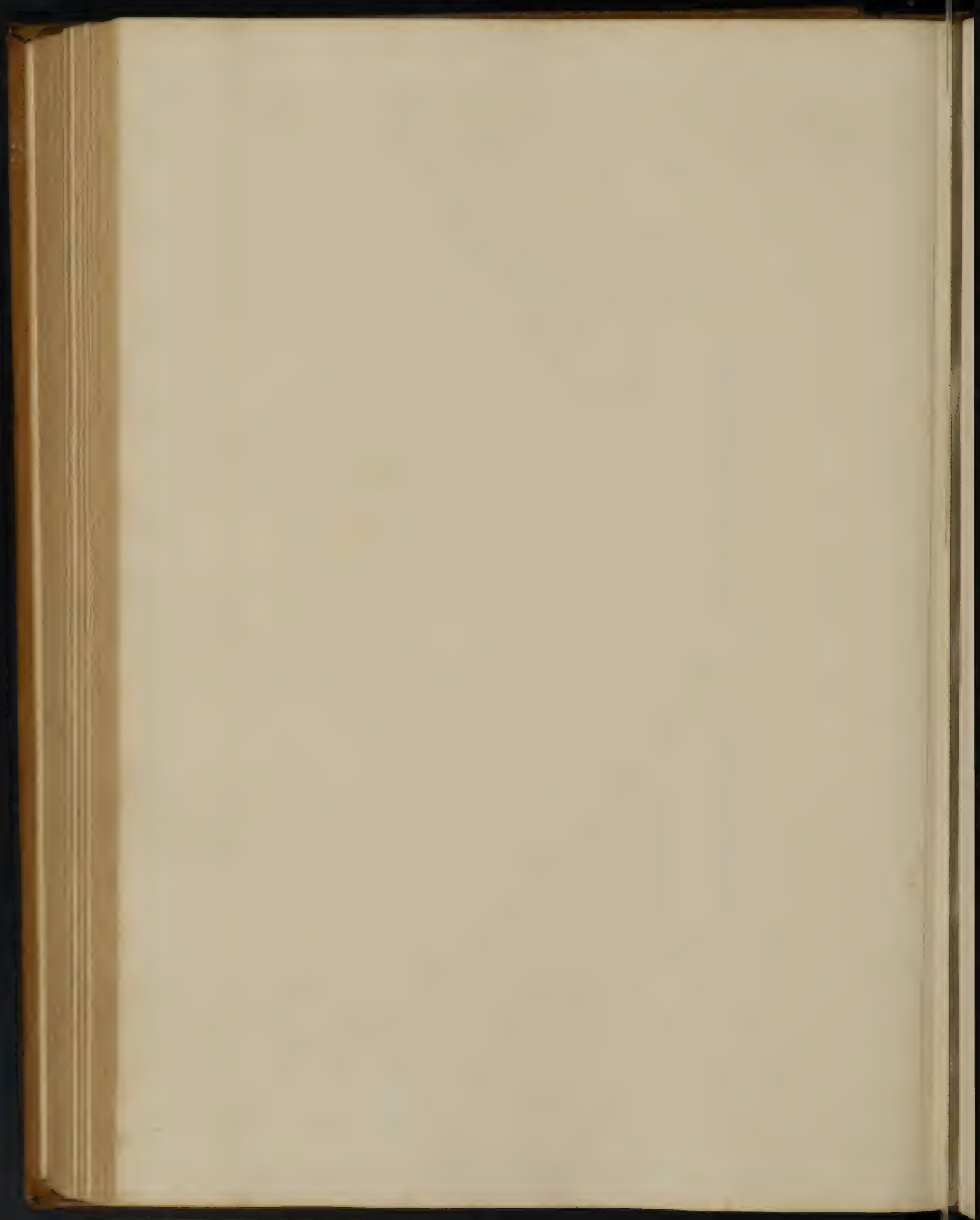
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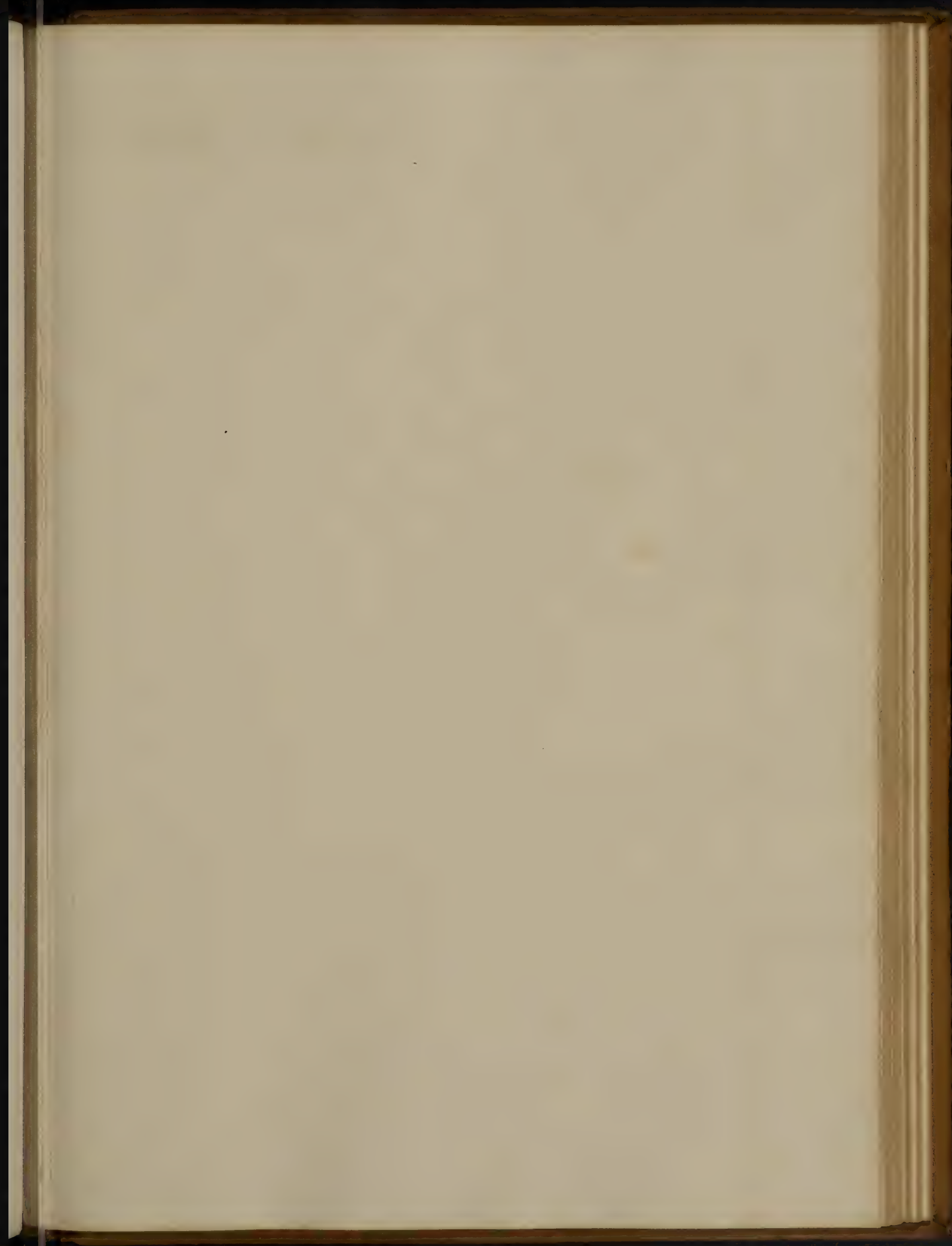
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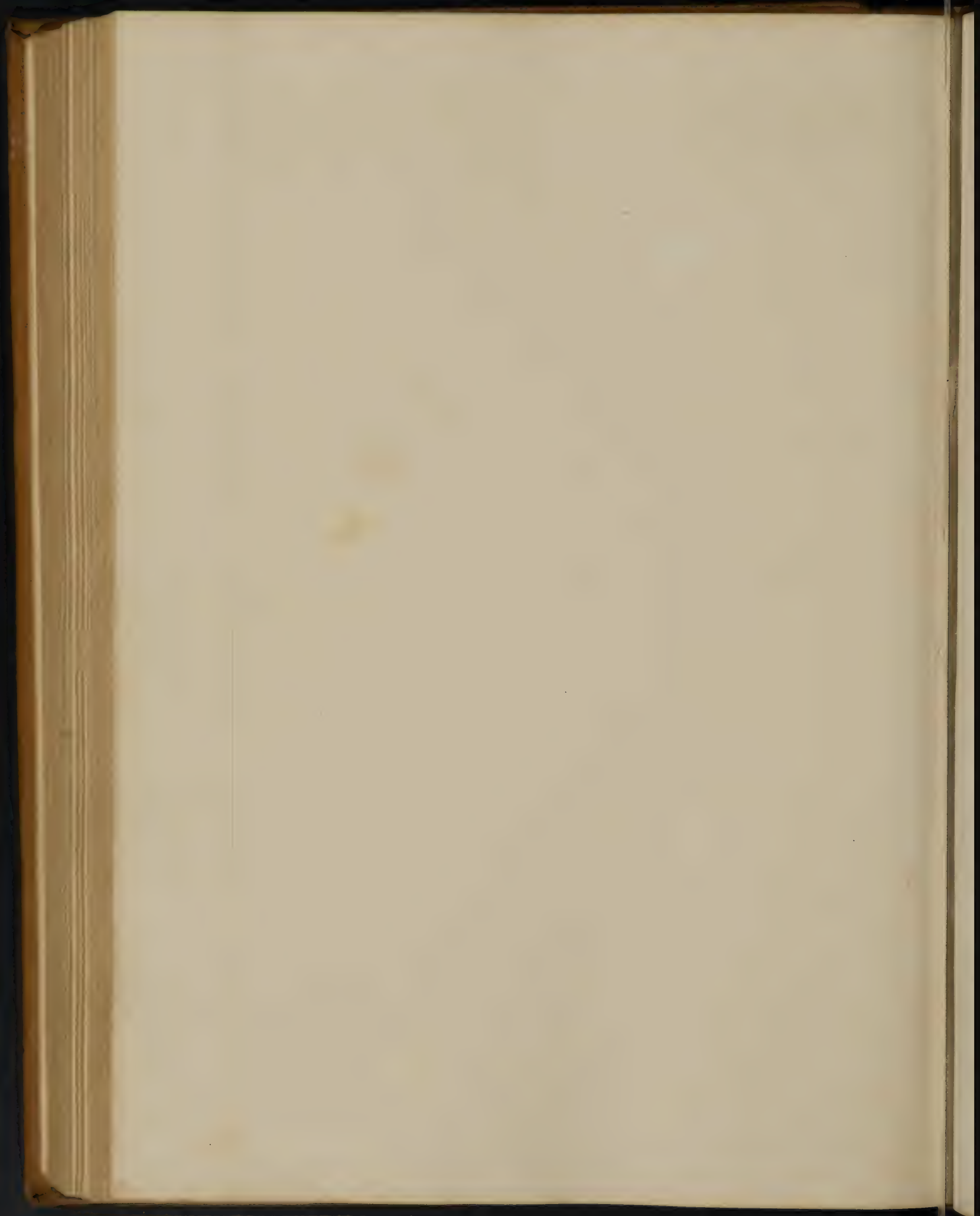


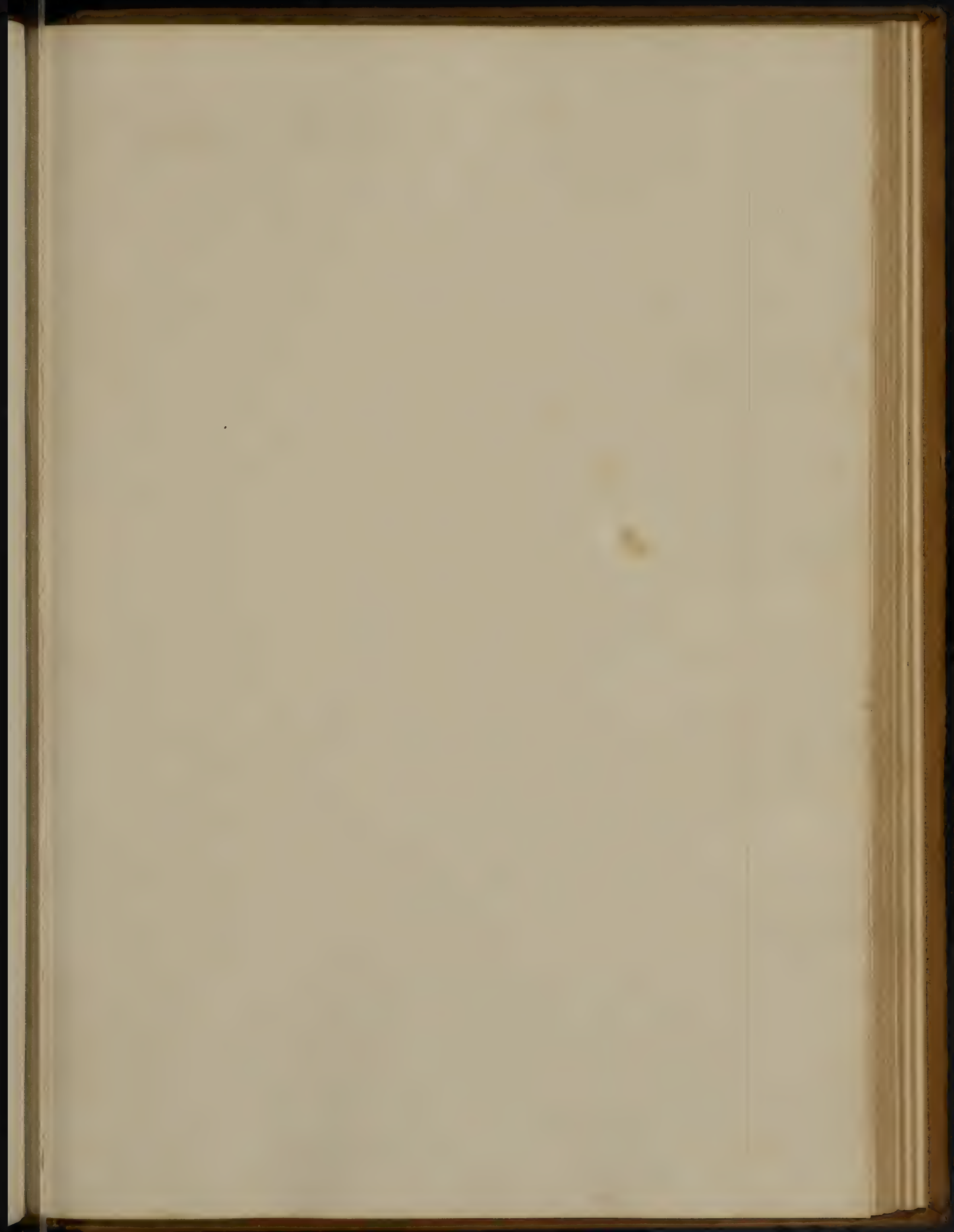




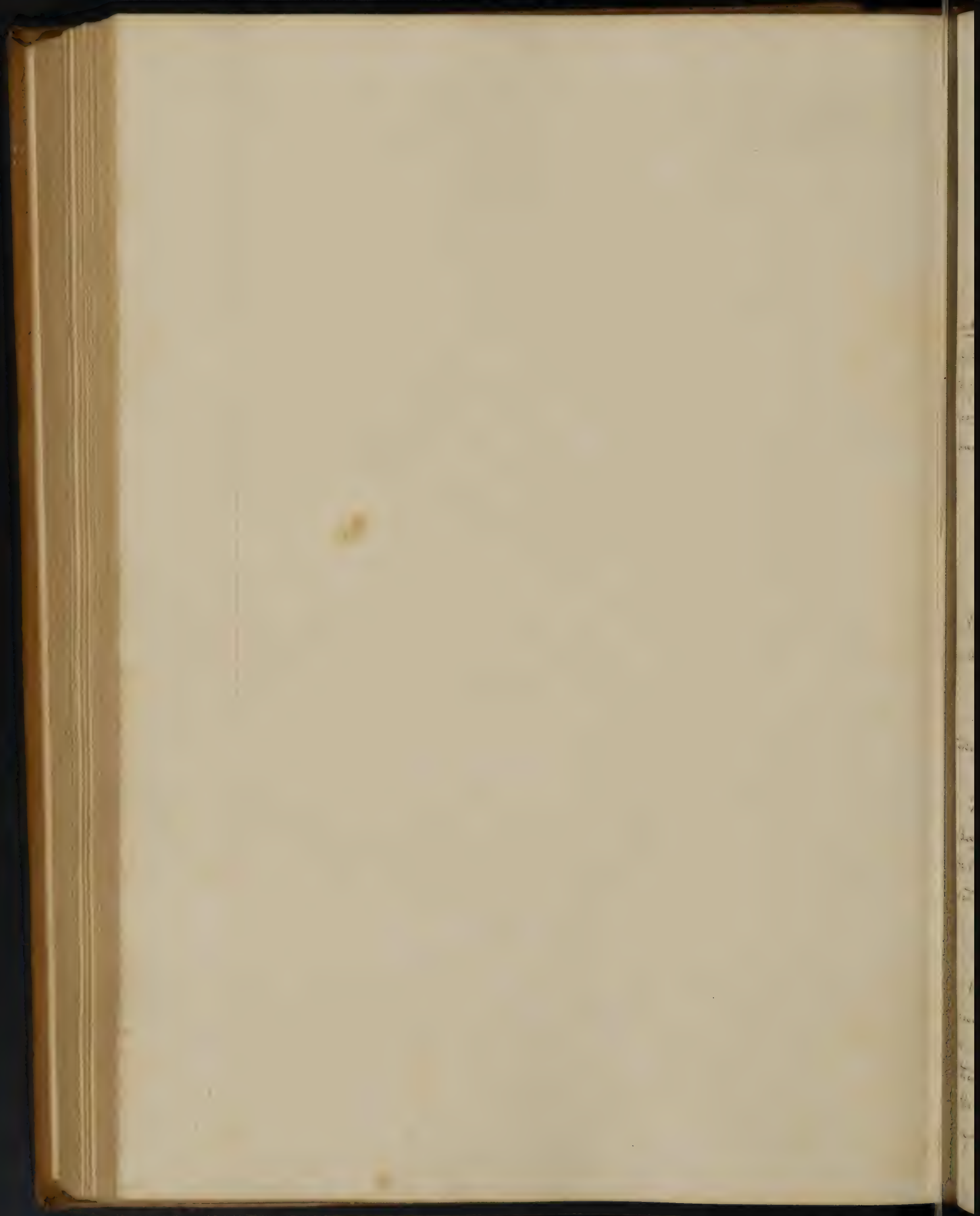












# Bailment.

Bailment is defined to be a delivery of goods by one person to another upon a contract express or implied, that they shall be returned to the bailor or disposed of according to his direction when the purpose for which they were bailed is answered. Dec. & Trust. 129.

Yelv. 172. 7 T.R. 392. 7. 9. Jones. 3. 48.

2 B.L.R. 451. 12 J. Mod. 482. Cro. E. 622. 2 Com. on C. 251 or 288 7 Fern. 268.

Every bailment vests a qualified property in bailee. Cro. E. 622. 2 Com. on C. 251. Dec. & Trust. 129.

Jones 112 Yelv. 172. 7 T.R. 392. 7. 9.

See Coke in Co. Lit. 89. a. in Plowthorpe's case takes a wrong distinction. 4 Co. 85 b.

The party delivering the goods is called the Bailor. The person to whom the goods are delivered is denominated the Bailee, & the transaction is called a Bailment.

On the delivery of goods by one party to another in this manner, the Law presupposes a contract, viz. that the bailee shall restore them to the bailor whenever he shall demand them, or that he shall answer with the goods the express terms of the contract.

2 B.L.R. 451. Jones 3. 48.



Bailment. tho. a species of contract has, from  
 a great variety of peculiarities wh. attend  
 to law respecting it been considered as a dis-  
 tinct head in most of the Digests of Law.

It has been sd. of a pawn  
 that he differs from a bailee since he has  
 a special prop<sup>y</sup>. in the thing pawned, but  
 in truth, there is no distinction.

4 Co. 83. Co. Lit. 89. a.

Indeed upon this title there has been more  
 diversity of opinion than upon any other in  
 the law of its limited extent.

It is an universal rule that every bailment  
 vests a qualified prop<sup>y</sup>. in the bailee, for a  
 more lawful possession gives a special prop<sup>y</sup>.  
 & implies a right of possession. Jones 112.

Yelv. 172. 57 J.R. 392. Stra. 305. 2 Yelv. (what  
 sd.) 105 b. 6. Hound. 302.

2. In Northcote's case (4 Co. 83. Co. Lit. 89. a  
 & 3 J.R. 40.) there was a distinction made be-  
 tween bailee & pawnor, but since then there  
 is holden to be no difference. The nature  
 of the interest vested is in most cases the  
 same. The only shade of diff. is in the degree  
 of interest vested, the pawnor having a higher  
 an interest & a stronger lien on the goods  
 than the bailee. Jones 112. D. & Stu. 129. Yelv. 172  
 1 J.R. 389.

It appears from genl. principles as well  
 as from authorities that a bailment vests a  
 special prop<sup>y</sup>. in the bailee, for even lawful

possession vests a qualified property in the possessor. Even if finding of property vests a special property in the finder, so yet he may maintain trespass or trover vs. any one who unlawfully deprives him of his possession.  
7 L.R. 397. 9. 1 Ultra. 308.

It is a genl. rule that a bailee from his obligation to restore must keep property according to the terms of his contract and be answerable to his bailor for any loss or damage wh. it may sustain while in his possession. {Bailee's Duty.

But to the foregoing rule there are some exceptions, as where loss or damage was sustained without any neglect or misconduct on the part of the bailee.

In determining whether a bailee has been guilty of any misconduct of quality to goods bailed - the nature of the bailment - the character of the society in wh. the bailee lives & his own conduct must all be taken into consideration.

Indeed, it is the determination of this question, wh. presents the greatest difficulty in this title. - Gold requires more care than Jerns. - Jones &.

In genl. a bailee is bound to use a degree of care proportionate to the nature of the bailment. where it is under a genl. acceptance. In some cases ordinary care is required, in others less & in others more. 12 Mac. 236. Jones &.



Ordinary care is that wh. rational or prudent men in genl. use in conducting their affairs.  
Jones 9. 10.

The degrees of care on either side of this standard have not a distinct appellation.

Whatever exceeds is called more than ordinary care, & whatever falls short is called less than ordinary care - Jones 9. 10. 11. 12. 13.

5. To every degree of care there is a corresponding degree of neglect. The degree of neglect opposed to ordinary care, is called ordinary neglect. The omission of greater than ordinary care is called less than ordinary neglect, & so on in inverse ratio.

Neglect greater than ordinary is styled gross neglect & is *prima facie* evd. of fraud, tho' not in all cases conclusive; for if a bailor is negligent of his own affairs & at the same time is negligent of his bailor's, this neglect is not considered fraudulent.

Jones 11. 13. 31. 64. 5. Ex. Re. 915.

## 6. Genl. Acceptance.

If genl. acceptance is where there is no spec. agreement as to the degree of care or diligence to be used by the bailee. But where there is an agreement, the maxim "*expressum facit cessare tacitum*" applies.

It has been laid down as a genl. rule that every bailee under a genl. acceptance is bound to use a degree of care proportionate to the value of the bailment. Jones 8.

There are ergo diff't. species of bailment. requiring diff't. degrees of care on the part of the bailee. These are taken principally from the celebrated distinctions of Lord Holt in the case of Coggs vs. Barnard.

These distinctions are more genly. followed than the classification by Jones in his treatise on Bailments. Lord R. 915.

## Rules.

II. When the bailment is for the benefit of the Bailor only, nothing more is necessary for the bailee than good faith & he is liable only for gross neglect, if the goods are lost or destroyed. Lord R. 915.

Jones 15. 16. 21. 22. 32. 51. 53. 54. 55. 100. 112.

(4 Geo. 83 b.) 1 Dow. 6. 235. 7.

(Southcot's case contra-stiter.)

This rule is founded upon the supposed Equity of the case, & perhaps a more equitable rule do. not be established. 344; the bailee receives no benefit from the contract & the bailment is advantageous to the bailor alone all that ought to be expected of him is that he should observe good faith & not practice any fraud upon the party to whom the goods belong.



In 4 Co. 83 b. it is holden that a bailee must keep goods thus bailed safe & at his peril, - but this is not law.

The bailee may however in these cases by special agreement extend his liability beyond the general rule. He may bind himself to answer any degree of care & in short he may make himself an insurer vs. all casualties at all events. Jones 21.2. 31.2. 6. Ld. Rd. 910.

**II.** When a bailee alone is benefitted by a bailment, he is liable for slight neglect. This rule is founded upon the maxim "qui sentit commodum, sentire debet onus". Jones 11.16. 23.33. 89.96.1.

**III.** When a bailment is for a mutual benefit of both parties a bailee is not liable for ordinary neglect, being bound to use ordinary care. Jones 14.22.3. 101.5.

These rules are intended to apply to those cases only where a contract is implied or acceptance is general. There may be express contracts between the parties by which a bailee will not be liable in any case, or he may make himself liable at all events.

When there is only an implied contract a bailment is a general acceptance, but when there is a special agreement it is denominated a special acceptance.

## Diff. kinds.

8

According to Le. Holt, whose distinctions we shall adopt, bailments are divided into six diff. kinds.

Sir Wm. Jones divides them into five.

### I. Depositum (i.e.) Deposit.

Depositum is a delivery of goods by bailor to be kept by bailee with reward or hire. This species of (gratuitous) bailment is sometimes called a naked bailment. & the bailee a naked bailee & also depository. Hence as the bailment is for the sole benefit of the bailor the bailee has nothing required of him but good faith & is liable only for gross neglect.

Le. Re. 912.13. Jones 50. Bull. 72. 1 Pro. C. 247.

Bull. 72. Esp. 518.

### II. Commodatum or Lending.

Commodatum is a gratuitous loan of goods or utensils wh. are to be used by the bailee for his benefit with hire & to be specifically returned to the bailor. This is directly the reverse of the former case. This bailment is for the sole benefit of the bailee & he is liable for slight neglect. The bailor is called the lender, the bailee the borrower. This kind of bailment is often expressed by the words "loaned for use".

Le. Re. 913.15. Jones 50. 89. Bull. 72.

1 Pro. C. 247.9. Esp. 619. 1 Mac. 233.

There is a material distinction between this loan for use, or a mutuum as a loan of money or a loan for consumption. The latter is

9.



not to be specifically returned but to be re-  
turned in kind - as a bushel of wheat for a  
bushel of wheat &c. Here a bailor has not  
a special but an absolute property in a thing  
loaned & if it is destroyed immediately after  
a bailment, a bailor must suffer a whole loss.  
A mutuum is only a bailment.

Jones 89.90. Doct. & Stu. 129. 1 Bac. 241.

### III. Locatio et Conductio (i.e.) Letting & Hiring.

Letting & hiring is a delivering of goods to be  
used by a bailor for hire or reward to be paid  
to a bailor. La. Re. 913. 1 Bos. Co. 251.

Jones 50.119. Bull 72. 1 Bac. 243.

In this species the bailment, locatio et conductio  
or locata et conducta are synonymous with bailor &  
bailor.

Mr. Jones classifies this  
species of bailment under his 3<sup>rd</sup> division wh. he  
calls locatum but I think his classification is  
it is very improper, for in a fifth class of goods  
are to be used in a measure for a benefit  
of a bailor.

11.

### IV. Pignus (i.e.) Pawn.

Pawn or Pignus is a delivery of goods by  
a bailor to a bailor as security for a debt.  
It is a debt due from a bailor to a bailor.

Here a bailor is called a pawnor & bailor  
a pawnor. La. Re. 913. Jones 50.104. Bull 72.

See L.C. res. 13p. 624. 1 Bos. Co. 251. 2. Yelv. 172.

## V. Clasp.

The fifth class of Bailments is when goods are delivered to, & bailed to be carried, or, to have something done to them by, & bailed for a reward to be paid by, & bailor.

Le. R. 913. Jones p. 123. 44. (Bull 22. Feb. 172.)  
1 Dow. on C. 251. 2. 3. (See. Let. 205. Exp. 625.)

This class of bailments includes, & delivery of 11. goods as well to public as private carriers. Still, there is a material diff. between 3 two as to their liability, - a public or a common carrier being liable to a much greater degree than a private carrier. Le. R. 913. 12. 18.

Bull 72. 3. Jones p. 144. 15. 125. 1 Dow. 253. 1 Bac. 247.

This species of bailments includes also a discharge of goods to Factors, Bankers & Taverners, & Bailiffs, in short to agents genly. (i.e.) to common or special carriers. (See aucts.)

## VI. Mandatum.

A delivery of goods as in 3 last case with only this diff. - that the bailee receives no reward for his services & is liable only for gross neglect.

This is called a mandatum, & the bailor, & mandator. The bailee is called a mandatary.

Jones p. 94. 1 Dow. C. 254. 5. Bull 73. Cro. Jac. 224. Le. R. 913. 18.

I. A depositum or a delivery of goods to the bailee to keep for, & use of, & bailor without any reward. Here as 3 deposit is made entirely for,



15. They have since been denied by writers genl.  
viz. La. R. 835. 9/11m. Bull. 77. V. 1099. L. E. 815.  
1st. 89. a. b. c. L. R. 133.5. La. R. 9/11. Jones 58.

A distinction has been taken between liability of a depositary making a special agreement on a valuable consideration & on making such an agreement without consideration. But this distinction is now done away. Indeed a depositary can in strictness make such a contract upon valuable consideration, for as soon as he receives, or is to receive a valuable consideration for & except if a trust, he ceases to be a depositary & becomes a bailor of the fifth class.

But not relying on the article of accuracy - it is held that the mere delivery of goods is a sufficient valuable consideration.  
2 Bac. 246. Doct. Hod. 129. La. R. 909. 19. 505.  
(But 812.) 12 Mod. 187. Co. L. 245. 6. 187. 3 Rees Hist. Eng. Law 245. 6. 323. 4. 394. (Dille Conts. 118.)

It is held in Southcote's case that a bailor delivers goods to a depositary in a locked chest & retains the key. The depositary is not liable for the goods, - for the chest only. 1 Bac. 237. 3 Atk. 47.  
4 Co. 83 b. 84. a. 1 Inst. 89 a. b.

When La. Coke gives the doctrine of Bailment was not understood.

This doctrine is denied by La. Holt in the 16. case of Cogg's vs. Bernard for two reasons.

1<sup>st</sup> Because if the bailor had the key, it would be of no use to him, & - 2<sup>d</sup> That if he is not capable to defend the goods from rapine or theft. La. R. 914.

J. J. thinks that neither opinion is on the ground that ought materially, if not entirely to govern in this case. (viz.) The knowledge or ignorance of the bailor with regard to the contents of the chest; for the bailor's



responsibility or rather his care ought to be proportioned to the value of the goods or the temptations wh. they offer to rapine or theft -

Money or jewels ought to be kept with greater care than coarse cloths or wares, yet if a bailee was ignorant of the contents of a box containing money &c. might he not place it with culpable neglect where he wd. a box containing things of inferior value?

Ld. Rd. 442. 505. 51. 909. 14. Jones 51. 4.

A depositary may make himself liable at all events, i.e. he may insure vs. all risks. But even here he wd. not make himself liable for the loss or damage occasioned by the acts of Providence, - acts of violence, nor constitutional force. Jones 62. 1. Hob. 34.

Pro. 75. Ld. Rd. 910. Doct. & Stu. 130.

1 Pro. C. 248. 9. 4 Co. 80.

17. But in such cases he wd. be liable for losses by mere theft. This is analogous to the case of a warranty in a lease by wh. the lessor contracts for an undisturbed enjoyment in the premises. But a warranty is not considered as extending to wrongdoers. 1 Pro. C. 248.

The term wrongdoers is used in a loose sense in most of the books. Title Cont. 131.

"Coat. Book." 42.

A depositary may, however, by such special warrant. make himself liable for loss by theft. For this is what he wd. have guaranteed vs. the acts of Providence. But vs. physical force no contract of a bailee can be a security, for a man can't bind himself to do that wh. is the nature of things he can't perform.

If special contract will enough render the  
depository liable for theft, or what is easily  
guarded vs. 4 Co. 88. 24. L. R. 915. Jones 78.

If a depository retains goods after they  
are demanded by a bailor, he is liable in  
an action of Detinue, Trover, or Assumpsit,  
1 Roll 128. Cro. E. 781. Jones 114.

8 T. R. 308. 2 W. R. 104. Esp. 10. 8 Esp. R. 18.

## II. Commodatum or gratuitous loan.

Here as a bailee is alone benefitted by a bail-  
ment, he is according to a genl. rule liable for  
a slight neglect (whereby a loss ensues). For a  
maxim "qui sentit commodum sentit etiam onus"  
applies, Bull. 72. L. R. 915. Jones 91. 1 Bos. & C. 249. 50.  
1 Bos. & C. 244.

The requisite degrees of care must be var-  
ious in 3 diff. cases. Each case must be de-  
termined by its own particular circumstances.

An example has been given viz. If A.  
borrows a horse & puts it in a stable with the  
locking door, he is liable if the horse is stolen.

But he wd. not be if the door were shut  
& locked. L. R. 915. 15. 1 Bos. & C. 249. 50.

1 Bull. 72. 1 Bos. & C. 244. Jones 91. 2. 61.

This example might be good in some cases  
but certainly not in all, as in case of open  
violence wh. he cd. not resist.

Qu. If he use as much care as usual, wd.  
he be liable? (L. G. trusts not.)



19.

But on the contrary the borrower is not only liable for a loss occasioned by force wh. he does not resist. Hence a borrower is not *respondeat* liable for robbery. To make the bailor liable in such case the bailor must have put the property in a position of exposure, as if the bailor should travel in the night in a wood frequented by robbers, & wh. was generally considered as unsafe. 1 Rev. Co. 251. Ld. R. 916.

Jones 61.92 n. 95.

A borrower is not in general liable for non acts wh. are inevitable, as lightning, earthquakes &c. Yet even in these cases he would be liable if he should wantonly expose the property to such dangers. As by putting a horse on board of a boat in the time of a tempest. Ld. R. 915.

1 Rev. Co. 259. Co. 249. 56. Jones 51.

20.

A borrower may render himself liable for a loss occasioned in whatever way by a breach of trust for from the moment he becomes a trustee, & is entitled to none of the immunities of a bailor. Thus if a borrower takes a horse to ride to St. George's, & directs the man to ride towards Brompton, & the horse is killed by lightning he would be liable. Jones 75.9.

Also if any one borrows a horse or any other chattel for a limited time as for a day or two, & does not return it within the time limited he is liable for any loss wh. may happen after the time has expired, & he cannot be sued for the property. Ld. R. 915. 17. Jones 93.6. 1 Rev. Co. 259. Co. 249. 56. Jones 51.

And this rule as to breaches of trust holds  
as to every species of bailment. La. Or. 917.  
10 Bac. 297.8. Cro. J. 244. 10 Co. C. 253.

### III. Locatio et Conductio or Letting & Hiring. 21.

This is a loan of property to be used by the bailor  
for his benefit or use in consideration of  
a reward or hire paid to the bailor. By this  
contract the bailor gains a qualified property in  
the thing bailed, & the bailor an absolute right  
to the hire or thing to be paid.

La. Or. 48.15. Cro. J. 625. Jones 119.20.

Here as the bailment is eventually advanta- 22.  
geous to both parties, the risk must on prin-  
ciple be equally divided between them.

The bailor is bound to use ordinary care  
& no more, & he is liable for ordinary neg-  
lect & no less. Jones 11.120.

Lee. Holt says that the bailor is here liable  
to the utmost diligence & consequently equally  
liable with a borrower. La. Or. 916. 10 Co. 251.

Bull 72.

But this is contrary both to precedent and  
analogy. Lee. Holt used loose language on  
this occasion, & notwithstanding his dictum the  
principle is settled & well settled that a hirer  
is bound to use only ordinary care. 10 Co. C. 252.

La. Or. 916. Jones 21.3.31.120.

Jones traces this mistake to a mis-  
translation of the Latin superlative. Bull 72.

Bracton folio 22. Jones 37.122.3. (diligentissimus.)



It is there is no second case where more than ordinary care may be required, & as no analogous case requires more, & hence is of course excused in case of robbery. tho. it so. after, & decision if he had wantonly exposed, & goods.

Jones 126. 120. 3.

It was formerly (held) a question, whether a bailee was bound to repair an instrument, or other article lent to him. But it is now settled, that if a bailee wears out a thing bailed, he must repair it himself.

Jones 1 Bae. § 21. 31. "Contracts"

25.

#### IV. Radium. Pawn or Pledge.

Radium is a delivery of goods or property by bailor to a bailee, as security for a debt due from a bailor to a bailee. 102ae. 237.

Jones 50. 104. La. R. 9, 3. 16. La. Holt 235.

This definition is not sufficiently comprehensive; in pawn, may be pledged where there is no existing debt.

On this subject it may be material to observe, that in analogy to a law of mortgage if goods are delivered to secure a debt due from a bailor to a bailee accompanied with a right of redemption, whatever may be the form of contract or its terms is still a pawn.

14. Blk. 114. La. R. 973.

26.

This kind of bailment, being advantageous to both parties (in securing a present debt & procuring continuance to a person). & hence is to be applied in case of he is liable for less than ordinary care.

Ed. R. 917. Jones 105. 12. 1200. 6. 282. Halk. 523. 4.  
4 Com. D. "Bailment" 288. Jones 61.

But in Southcotes case Ed. Coke says that  
a bailee is bound to keep 3 goods as his  
own & is liable only for gross neglect as a  
depository, & 3 reason assigned is, yt 3 bailee  
has a propy. in 3 goods. 4 Co. 83. b. b. Lit. 89. a.

But every bailee has a propy. in 3 thing  
bailed, so that there is no ground for this  
distinction, & 3 rule founded on it is not  
law. Doer. & Stuart 129. 4 Co. 83. b. Dyalo. 172.  
1 Bac. 211. Jones 105. 112. 113. 1 Inst 89. a.  
Co. Lit 89. a.

It follows then yt when 3 loss is occasioned  
by robbery 3 bailee is not prima facie lia-  
ble, tho he may subject himself to any loss by  
a breach of trust or wanton exposure of 3 propy.  
& when 3 degree of care required of 3 bailee does  
not exceed ordinary care by loss from robbery is  
contradistinguished from theft. Halk. 522.

Ed. R. 916. 17. Jones 105. 13. actor 99. Jones 61. 107.  
109. 11. 1200. 252.

In Southcotes case it is laid down yt 3 27.  
bailee is not liable for losses occasioned by  
house theft & 3 reason assigned is 3 same as  
yt assigned above - to show yt he is liable only  
for gross neglect, his having a propy. in 3 goods  
& his being bound to keep them as he keeps his  
own. 4 Co. 83. b. Dy. 624. 5. Dyalo. 178. Co. Lit. 89. a.



Jones holds unconditionally that a pawnor is liable for a loss occasioned by theft. This reason is the same assigned by Le. Coke in *Flouthcock's* case. He says a pawnor can't be supposed to have used ordinary care, if he permits goods to be stolen from him. Jones 106.7. 61. 109. 116.

But Jones clearly contradicts himself as well as the analogy of the law. (Jones 61. 52. 109. 116. 118.) It is not true that ordinary care will afford protection vs. a loss ~~by~~ theft. & it is contrary to genl. experience to assert that men of common prudence do not suffer by theft.

It is a question of fact whether ordinary care was used or not, & this must determine a pawnor's liability. It is not a conclusion of law.

Le. Holt places this liability for a loss by theft, on the same footing with that of a factor who is excused if he uses reasonable (i.e.) ordinary care. Le. Re. 917. 18. Path. 542. 1 Vent. 121. 100. 252.

Indeed Jones himself says that in a commodatum a borrower is liable for loss occasioned by theft, unless he used extraordinary care. Le. Re. 917. 18. 1 Vent. 121. 100. 252.

Jones 92. 109. 18. 28. 38. 61. 116. 118. 122.

The pawnor, like other bailees, gains a qualified property in the thing bailed. But this interest is defeasible as by paying on the day he redeems his title at law. He also a broker tender who for any purpose of diverting the property of a pawnor is equivalent to a payee. 1 Bac 237. Bull. 72. 22. 31. 44. 258. Cro. J. 255. 4 Car 83. 6. 1710. 179. Jones 116. 22. 23. 27.

If after tender & a demand th. J. propy. or if after payt. on y day appointed y pawnee refuses to restore it, he is guilty of a breach of trust & is of course liable for any damage or loss wh. may be sustained by J. propy. while in his hands or possession, however it may be occasioned as by Lightning &c.

Walt. 322.3. Le. R. 917. Esp. D. 623. 22 R. 27.  
4 Co. 3. 6. 1200. 430. 1 Bac. 257. 8. Bull. 72.

And on y pawnee's refusal to redeliver y goods after payt. &c. J. pawnor may immediately commence an action of Trover, Detinue, or *Assumpsit* vs. him.

The pawnor in case of a breach of trust is not only liable for all damages afterwards occasioned to y propy. but is immediately liable for y breach of trust.

The rule is y same if y refusal is made by y pawnee's clerk, agent &c. acting regularly in y ordinary course of his business; for this is equivalent to a refusal by y pawnee himself on y maxim "qui facit per alium, facit per se".

But if y refusal of y persn. &c. was out of y regular course of his business, y pawnee wd. not be liable. Cro. J. 244.

Jones 111. 12. 26. Walt. 441. Moore 892.

"Trover" Esp. 615. 1200. 233. Le. R. 917. Bull. 72.

In this case, however, pawnor may have his election of three actions - "Trover" or "*Assumpsit*" or "Detinue". The breach of trust is y foundation of y action of Trover, & y breach of an express or implied (warranty) contract, y found-



ation of & action of & apt. for in bailment, &  
pounce expressly or impliedly, in relation  
to & prop<sup>y</sup>. pawned, provided to return  
it on & day appointed provided & debt  
is satisfied by part. or tender

Bull. 72, Bac. 287.87 Com. D. 220.1.

Com. J. 258. Jones 118. & Com. 258.

30. But & pawnor can have neither of these  
actions untill <sup>he has</sup> paid or tendered part. if all  
yt is due, both principal & legal inter-  
est, even where & prop<sup>y</sup>. was pawned as se-  
curity for repayment, for these actions only case  
are founded on equitable principles & "the  
party yt seeks leg<sup>y</sup>. must do it" 12 D. 153. 444  
\* This rule wd. not apply, if  
"Detinue" or C. L. action were brot, yt being  
an action stricti juris.

& refusal to deliver up prop<sup>y</sup>. pawned  
after part. or tender of part. of & sum due,  
is an indictable offence at C. L.

This rule is not genl. as to mere  
breaches of trust, this being considered only  
as civil injuries & not offences.

On this subject there was  
a diversity of opinion, but it seems now to  
be settled. 12 D. 222. 3. 92. Comth. 277. 3. 444  
& 12 D. 222. 3. 2. 444. 210. 1 D. 240. 2. & Com. 258.

This is a more rule of police, for  
it is clear, that a breach of trust in this  
case is no more culpable than in any other.

The object of & rule is to protect & pawn  
or from oppression, & danger of wh. is greater in  
this than in almost any other species of bail-  
ment, as & transaction is genlly. private, so yt.

& pawnor is enabled to conceal & fact, & fur-  
ther, pawns are usually made by necessi-  
tous persons, & those who are embarrassed.

The pawnor has in some instances a 31.  
right to use & pawnor's pawned. This right  
when it exists is sd. to be founded on  
consent of & pawnor either express or im-  
plied. This presumed right is sd. to  
exist, or not, in genl. as & pawnor is like-  
ly to be improved or injured, or not aff-  
ected at all by & use. Jones 112.

1 Inst. 88. 2 Chalk. 522. Bull. 72. 1 Roll 538. 673.

It case in wh. pawnor can be made bet-  
ter by use can seldom occur. Jones suppo-  
ses & cases of a dog wh. is trained or confir-  
med in useful habits, by certain empl-  
oyments. Jones 112. 113.

And it seems yt when & things pawned 32.  
are of such a nature as not to be injured  
by & use, & pawnor has a right to use it,  
but it is at his own peril, for & use is  
for his own benefit, & he is liable at  
all events -- as if he shd. be robbed.  
The examples given are jewels &c.

But tho. these things will wear out, yet &  
injury done to them by careful usage is so  
small, yt & law will not regard it.

Chalk. 522. 2 Brac. 257. Bull 72. 1 Roll 538.

673. Loc. R. 917. Geo. Lit. 89. Jones 113.

This seems to be a more indulgence at &  
pawnor's peril.



Where  $\gamma$  pawned it at expense in keeping or  
 repair, he may reimburse himself by using it,  
 as where living animals are pawned. This  
 J. G. thinks does not arise from any consent  
 of  $\gamma$  pawnor but is allowed by law as a re-  
 compensation wh.  $\gamma$  principles of justice demands.

Lo. R. 916. 17. Exp. 625. Bull. 522.

Bull 72. Jones 114.

I have not says J. G. discovered from  $\gamma$   
 books yt  $\gamma$  pawnor is liable for  $\gamma$  use (i.e.)  
 $\gamma$  profits. He was by a Roman Law, & this  
 was set in opposition to  $\gamma$  expense of keeping.  
 Jones 115.

But where  $\gamma$  pledge will be injured by the  
 use, &  $\gamma$  keeping of it incurs no expense,  $\gamma$   
 pawnor has no right to use  $\gamma$  property. be-  
 cause tis so. that there is no consent im-  
 plied on  $\gamma$  part to  $\gamma$  pawnor.

But J. G. thinks  $\gamma$  law does not refer to this  
 reason, for  $\gamma$  duty of  $\gamma$  pawnor is to keep &  
 restore  $\gamma$  goods safely when  $\gamma$  debt is paid. &  
 as there is no expense incurred in keeping  
 $\gamma$  property, there is no principle of justice  
 wh. will warrant  $\gamma$  pawnor in using.

Lo. R. 917. Bull. 72. Jones 115.

And as  $\gamma$  pawnor has no right to use  $\gamma$  property  
 if he does use it - J. G. thinks he is ipso facto  
 guilty of a conversion, & liable to an action  
 of Trove. for in this action, unlawful use  
 is per se a conversion. 5 Bac. 266. 287. "Trove"

The law is y same, per Lord Holt, with resp. 34.  
pect to y finder of goods. The liability is goods  
certainly y same. The finder of goods is <sup>found.</sup>  
not liable in assault, for there is no con-  
tract between y parties. He ergo must be  
liable "ex delicto" & not in assault.

The finder has no lien upon y goods  
as y pawnbroker has, tho' the same degree of  
care is required of him. Gowel says, that  
y finder is bound to ordinary care in pre-  
serving y goods for y true owner.  
Ld. R. 917. 10 Co. C. 252.

There is a case in Bro. C. 219 in wh. it is  
sd. yt y finder is not bound to keep y  
goods in safety, & that he is not li-  
able for negligent keeping. It is a mere  
dictum & J. G. thinks it not supportable  
on any principle. The determination of the  
cause was correct, tho' y reasoning is erroneous.  
Esp. 509. 2 Bulst. 21. 1 Leon. 123.  
10 Bac. 252. Black. 155. 142. 1 Roll. C. 5 Bac. 252.  
5 Bover. 2827. Hobt. 251. 8 Co. 146.

tho' it wd. seem on y first impression  
yt. y finder shd. be subjected to nothing  
but gross neglect, for y sole benefit ac-  
crued to y owner, & y finder can't compel  
him to pay any thing for his trouble, the  
finder here being in y situation of a deposi-  
tary.

But in y case of a depository, y bailor  
delivers his goods, or not, as he pleases, &  
has y selection of his depository. This is  
not y case with goods found wh. in strictness



can't be said to be bailor's, - & it wd. seem  
gt & finder shd. use ordinary care, or leave  
goods to be taken by some one who is  
apt enough to use such care.

35. The St. L. is bound. enables & finder to re-  
cover a remuneration for his expense and  
trouble. Here then & finding is clearly ad-  
vantageous to both parties, & & finder is  
bound to use ordinary care upon & first  
principles of bailment. St. Court. 59 S. C.

J. G. thinks & C. L. rule is & same  
tho' & reasoning is vs. it in Co. E. 219. That  
however, was an action of trover vs. & find-  
er of goods wh. were spoiled while in poss-  
ession of & finder thro' his negligence, as al-  
leged. - & & demurrer, it was held, gt the  
action wd. not lie. & tho' & decision by case  
was perfectly correct, for it is clear that  
trover will not lie for a mere non fearance.  
The action shd. have been a "special action on  
& capen." 8 Co. 146. Hobt. 251. But & dicta of &  
Ct. in this case are not law. Exps. 59, 188 S. C.  
5 Burr. 2827. & 2 Chalk. 683.

36. It is well settled gt at C. L. gt & finder  
has no lien upon & goods for his trouble  
& expense. but upon demand made by &  
true owner with proof of ownership, he is  
bound to deliver & goods. - & shd. he refuse  
to deliver it, is guilty of a conversion, & is  
liable in trover. 2 H. Bl. 254, 238 S. C. 117.  
2 Burr. 631. "Proven" 54.

But a case of salvage is diff't.; for where goods are wrecked & abandoned at sea, & finder is Bailments, entitled (at sea &c.) to a reward. 98 B. 2.

This is a principle of public law of nations, not of C. L. - La. Re. 293. 2 H. Bl. 254.  
5 Bac. 270 "Trove"

But tho it has been agreed by all yt a finder has no lien upon goods, it has been a mooted question whether at C. L. he can in any case recover a reward. If he can recover at all, it must be "Indebitatus Ass't" for work done &c. founded on an implication of request & promise. The act of the finder is a mere act of courtesy, & a voluntary courtesy will not support an action at C. L.

Hale 104. 5. 1 H. Bl. 258. Esp. D. 87. 98. Holt 106.

I do not, ergo, see any ground of recovery.

But a refusal by a finder to deliver goods to a party claiming ownership of goods on demand is not necessarily a conversion, in a party claiming them & offers evid. of ownership. The finder is then made judge, whether a evid. of ownership is (post 91) sufft. & correctness of his decision is to be determined by a judge in an action of trover. If a finder refuse to deliver them after evid. offered, it wd. be a conversion. 2 Bulst. 312. Esp. 590.

But there is one case not decided in books to 37. my knowledge. (S. 4.) 94. finds goods wh. actually belong to B. - C. demands them, & on 94's refusal to deliver them, he brings an action



of trover, & by false testimony recovers the full value. Q. Can B. & true owner bring another action vs. J. to recover & value again?  
It was decided in Court. that he might recover vs. J. 12 Root 445.

But J. J. doubts & correctness of & decision on & ground, & that whenever law compels a person to pay a sum of money for a given cause or consideration it will not compel him to pay it again. Thus where a debtor has been compelled by an action to pay a debt to a wrongful ex<sup>r</sup> & law will not compel him to pay & same debt over again to & rightful ex<sup>r</sup>.

See in support of & genl. principle. 3 T.R. 123.5  
2 B.R. 11. Doug. 141. 161. 1 W.B.L. 449, 669.  
2 do. 408. Doug. 561.

Q. record between two parties J. & B. is not evd. between & parties B. & C. (i.e.) if & principle point determined as here it wd. not be evd. & it is right to prop<sup>y</sup> was in B. but it is evd. & a Jdgt. has been had by B. vs. J.  
"Evid. books Bankrupt Law 370."

But to & subject of pawn. If after a tender of paymt. by & pawnor, & a refusal to deliver & goods by & pawnor, & pawnor recovers in an action of trover, & pawnor may still recover his debt, notwithstanding his breach of trust. He must, however, make demand of & money tendered. 1 Bulst. 29, 31.  
2 B.R. 331.8. (in order to recover cost.)

If perishable goods are pawned, & decay in & hands of & pawnor. He does not for this rea-

son lose his debt, for  $\gamma$  debt or duty remains tho  
the pledge is lost. Indeed it wd. be gross in-  
justice in most cases to make answer for  $\gamma$   
other, - for  $\gamma$  pawn is not of equal value with  
the debt, but genlly double the amt. & law  
gives the parties a mutual remedy.

Again  $\gamma$  ~~pledge~~<sup>pawn</sup> is never considered as a  
satisfaction, but only as a security for  $\gamma$   
part. of  $\gamma$  debt. 1 Bac. 258. Nels. 170.

1 Bl. R. 563. 1 Inst. 209. Black. 523. 3 Broer. 1734.

Doug. 619. 1 Bl. R. 563.

While a pawn remains unimpaired in  $\gamma$  38.  
pawners hands, he may sue for  $\gamma$  debt &  
recover, in then was an agreement to  $\gamma$  contra-  
ct (i.e.) & he shd. rely on  $\gamma$  pledge only.  
2 Lev. 116. Stra. 919. Esp. 86. Nels. 179. 4 Com. 258.

However unjust might be the character of  
the pawn, he is still entitled to his debt.

The pawnor may however recover for  
the loss of his goods & thus justice will be  
done. 1 Inst. 209. Black. 528. 1 Bac. 253.

If a debt, for wh.  $\gamma$  goods are pledged, is not  
paid by  $\gamma$  day appointed, & property in pledge  
becomes absolute in  $\gamma$  pawnor by law, & is  
forever gone from  $\gamma$  pawnor. The principle is  
the same as in  $\gamma$  law of Mortgage, the condition  
of wh. being broken, the title becomes  
absolute in  $\gamma$  mortgagee, & in analogy to  $\gamma$  law  
of mortgages & pawn has an Equ. of Redemption  
Touch. 220. n 185.6. 1 Inst. 203. Bath. 225. 34 Hk. 225. Co. Lit. 205.



It appears to me, however, yet this right of Redemption can be exercised only when the propy. remains specifically in the hands of the pawnor, or has been assigned by him as a pledge; for by the debts not being paid at the day, the propy. in pledge is absolutely vested in the pawnor in law, & he may lawfully sell it.

See 22<sup>d</sup> Vol. Christian Observer 176. where it is said, yet pawnor is obliged to pay back the surplus to pawnor. It is also in this case yet if not paid within 12 months & one day the pawnor may sell, & if he receive any surplus over the debt & expenses, they must be returned to pawnor.

J.G. thinks yet where no time is appointed, the law appoints this time. It does not appear from the report he saw.

A distinction is to be observed between a mortgage & a pawn of personal propy. The mortgage has a genl. propy. in the thing mortgaged, & there is no Eqp. of Redemption at L. after the day of payt. has passed. The mortgage does not create a lien, as a pledge does. Jones 8. 95. 8. 1 Rep. 278.

5 Lestr. 258: 395. a pawn is a lien.

But in the case of pawning propy. properly so called, this right of redemption exists after forfeiture even tho it was agreed at the time of making the contract, yet if the propy. was not redeemed at the time appointed, it shall be considered as a sale. This is in analogy to mortgages. Once a mortgage always a mortgage.

This maxim applies equally to pawn.  
But not precisely express<sup>ly</sup> meaning, sh. is,  
that if propy. is once conveyed as a security  
with a right of redemption no collateral  
agreement made at <sup>the</sup> time shall destroy the  
right of redemption. This rule is inten-  
ded to protect poor, defenceless debtors  
from oppression & extortion. 2 Ves. 698.

1 Bac. 238. 1 Bac. 38. 238. 1 H. Bl. 119. 2 Fern. 698.

A factor can't pawn <sup>the</sup> goods of his princi-  
pal so as to give <sup>the</sup> pawn a lien upon  
them as vs. his principal. 7 East. 5. post 668.  
5 T.R. 604. 1 H. Bl. 364. Vtra. 1178. "Master & Servt" 27.

The reason appears to be that  
a factor has only a lien himself, & that as  
a personal right wh. can't be transferred.

The contt., being fiduciary, produc-  
ing a lien. J. J. thinks can't in any case  
be transferred & certainly not in this.

The principal is willing to trust  
a factor & to give him a lien on <sup>the</sup> propy.  
until their accounts are settled, but he  
does not give him power to appoint a  
new keeper. Vtra. 1178. 1 Com. B. 227.

It is now settled yt if a factor pledges  
the goods of his principal to secure a debt 39.  
due from himself, the principal may main-  
tain trover, after demand & with<sup>out</sup> tender  
of <sup>the</sup> amt. due to the factor. The act of pledg-  
ing is a breach of trust, by wh. he forfeits  
his lien. Vtra. 1178. 3 T.R. 404. 1 H. Bl. 382.  
7 East 5.



In failure of payt. at 3 day appointed, &  
baunce is at liberty to sell 3 pledge, for  
3 title is absolutely vested in him by law.  
Ante 28. 1 Inst. 203. "Churston Observer" vol. 22. 176.

Assignmt. According to some opinions he may sell, or  
or a  
Lien. assign 3 pledge before 3 day of payt.  
1 Bault 29. 31. Owen 123. 1 Bac. 298.  
1 Ves. 330. 4 Com. 258. 9.

But these opinions for various reasons can't be  
correct. Every indent. implies a contract strictly  
fiduciary. Muller observes it a lien is a  
personal right which can't be transferred.

Lie. Ellenborough expressed 3 same  
opinion & similar doctrine is deducible plain-  
ly from 3 former cases. Cro. J. 244. (Mich. 178.  
(5 B.R. 606 \*) - 7 East 6)

The decision of this point one way or 3 other  
is very important, for if an assignmt. before  
3 day of payt. is not legal, it follows that  
3 baunce need not tender payt. to 3 assignee,  
but immediately claim of 3 baunce 3 money.  
& if he refuses he is ipso facto guilty of  
conversion.

It appears contrary to 3 analogy of  
3 law that a pledge shd. be assignable.

It is clear that a pledge can't be assigned  
to 3 king by 3 act of 3 baunce, as the Treasurer,  
Gelding &c. 1 Bac. 235.

But a person may thus forfeit what he is capable of  
conveying in his own right (i.e.) what he can convey  
by cont. 1 Inst. 8. 12. 12 Jac. 12. Cro. J. 336. 2 Bac. 235. 267.

1785. 228. Moore 100. 1785. 358 -

It is also settled that a pledge can't be taken on an  
ex. v. because of interest of the pawnor is  
of such a nature as to render it dangerous  
the night of the pawnor to allow it to be thus  
taken. 1785. 358. 352. 1785. 67. 6. 70. 6. 1785.

It is also down in 228. that a pledge can't be  
alienated, evidently meaning that it can't be  
assigned. 1785. 358. 1785. 228.

I think it appears from the authorities, analogy,  
& principle that a pledge can't be assigned  
before the day is paid.

A pledge is in the nature of a personal trust  
and it can't be assigned, because it is in a per-  
sonal situation, for if the pawnor should become a  
bankrupt, & the pawnor lost their goods or misconduct,  
the pawnor can't resort to the assignee.

This is a principle of personal security, as to  
relating to real property - not land. They can't  
be converted or embroiled. For can the mortgage  
insolvency or bankruptcy prevent a redemption.

But a chattel may be run away with, con-  
verted or embroiled.

There is a case in 2 Vern. 541-8. which seems to show  
that a pledge may be assigned before the day is paid. 41.

41. 41. pawned goods to B. who received them, and  
before the day is paid, pawned them to C. 41. not a  
bill to redeem of B. & it was decided that C. had  
paid the sum due from B. to C. as well as that due  
from himself to B.

But it is to be observed that the bill was  
not after redemption, so he can't have lost his



action at L. is not in question, when a question in  
trust is assigned was precisely what it should have  
been. But assignment can be made after for-  
feiture.

To have raised a question for suspension it should  
have appeared that there had been a tender of  
bond. If bond or action should have been  
tendered at L.

This point is not yet settled. 2 Term. 591, 835, 582.

Dec. in King. 1194.

But a donor may forfeit his interest in a share  
in a business before he has assigned it. But a King or public  
trust is a share with the assignor & debt due  
from the donor, and interest, forfeited by the donor  
is only an exception of the contribution. 12 Term. 581.

102 St. 2. 14th. 179.

According to J. G. & fair construction is  
that if a donor has assigned before the forfeiture of  
his share, he is to assign, he is to be immediate  
subject to an action in trover.

The assignee is also liable, he must deliver up.

42.

It was formerly held essential to a share  
that it should be delivered up with a receipt at a  
time when the debt was due. It was intended to  
show that it was delivered up afterwards, it was  
not a receipt, but a license to excuse a third party  
in taking it to be returned during the donor's  
pleasure.

But this is not so now. & it is now settled that  
a pledge may be delivered up well after as at  
the time of contracting the debt. 4th. 575. 2 Term. 50.

102 St. 238. 14th. 164. 15th. 58. 13th. 58.

43.

It was formerly doubted whether if one was  
to have a share, he might not have a tender of the share &

propos. in 3 cases, in which among 3 joint lives, &  
3 parties. Post 198. 77.

It is now settled yt in such case 3 same may  
redem. at L. at any time during his own life.  
tho. this is denied by two authorities. 1 Dec. 248.  
Bro. J. 244.5. 1 Bulst. 29. 2 Co. 79. 1 Pe. 172.  
2d. 2. 454. 1 Nov. 78.

Provided however yt 3 same does  
not call on him before to redeem. This was  
also in an added since 3 rule was laid down.  
2 Co. 79. 1 Pe. 172. 2 Co. 79.

But where no day of payt. is fixed, 3 same  
must be redeemed in order of payt. made, & it  
will saving 3 life of 3 same. 3 payt. or ten-  
ure is in exec. will not avail at L. - 1 Pe. 172.  
a 42. & a 42.

The reason of this is yt there ought to be 20.  
some limitation of 3 right to redeem, for since  
3 same might suffer, for tho. he may in 3 mean  
time see 3 same may be worth nothing & may be out  
to 3 reach of sweep, & thus 3 only remedy wd. be  
upon 3 same. 1 Dec. 248. 2 Bulst. 29.

1 Nov. 78. Bro. J. 244.5 2 Co. 79. 1 Pe. 172. 2. 2. 454.  
4 Com. 258. Dec. 420.

There sh. be a right of redemption after his death.  
Hence supposes yt there still sh. be a  
right of redemption in Eqq. after 3 death & 3 same  
because he has a right to sell a bridge af-  
ter forfeiture at L. 1 Dec. 248. 1 Bulst. 205.  
2 Term. 69.

4 If a day of payt. is fixed by contract 3  
same's interest is not defeated by his death shd.  
it occur before 3 day of payt. But after his  
death his personal representatives may redeem by



having or tendering just as if he had lived. 1 Bulst. 24. 132 ac. 238. 4 Ann. 28.

40.

V. Bailment of 3 fifth kind is a delivery of goods to be carried or to have some act done to them, as if a bailee for a reward, paid to him. 1 Jac. 50. 127. 8. 11. 3. 33. La. 82. 913. 17. 103 ac. 349.

This class includes a delivery to a common carrier, & Innkeeper & Mechanic &c.

1 Jac. 103. 4. or those exercising a private employment. La. 82. 917. 18.

The two diff. classes of bailment viz. common carriers & private persons require a distinct consideration.

### I. Private Bailments

It includes a delivery to a private person including a delivery to a private professional character - as to a Tailor, Bailee, Broker &c. or a private agent in general. It includes a delivery of crops to pasture to an agricultural farmer. La. 82. 918. 1 Jac. 50. 128. 9. 32. 4.

41. This bailment being advantageous to both parties, the bailee is bound to use only ordinary care, & is liable only for ordinary neglect, & that is correct both on principle & authority. 1 Roll 4. La. 82. 918. 1 Dev. C. 254.

1 R. t. 121. 12 9 Mo. 487. 1 Jac. 16. 22. 32. 128. 11. 22.

A bailee of this class is prima facie excusable (3 same as in 3 third class) in 3 case of robbery, - as 3 other bailees before mentioned. 1 Jac. 129. 50. 8. Inst. 89. a. La. 82. 918.

1 Holt 131. 4 Cr. 84. a. Moore 462. It was truly exposed no excuse. This rule applies to all bailees of this description.

In case of a mere loss by theft, a bailor is  
liable or not, as it appears if he used ordin-  
ary care or not. Jones 138. 1 Tent. 121. 2 B.R. 918.

Ante 27.8.

2 Lev. 5. 1 Roll 4.

If a thing bailed is detained by bailor's  
landlord for rent, as it may be, if bailor is  
liable it seems for permitting it to be dis-  
turbed upon instead of his own goods.

He must be liable at least for ordinary  
neglect. Ante 17. Jones 142. 3 B.L. 5. 3 Bwr. 1398.  
n 1498.

It wd. seem if he is liable independ- 219.  
ently of all neglect for as a bailor's prop-  
erty had been sold to pay his debt, he shd.  
be liable to a bailor up for money laid out  
or expended for his own use. Here he is no  
loser, for he pays only for a benefit recd.

According to Jones if metal is delivered to a  
smith to be wrought into an utensil, the  
smith is not liable as bailor.

Which a delivery he maintains vests the  
propy. absolutely in the smith as a mutuum  
& if a loss happens, he must at all events  
be liable. Jones 143. 89. Ante 9.

The reason is if the metal when wrought  
can't be identified. 2 B.L. 404. Reph. 38. as  
glasse made into bread, grapes into wine.  
See 19 Johns. 44. Location &c.

This seems to be incorrect, tho it is true  
if the owner can't identify the metal, yet  
if it can be proved, it is the same & it



can be identified in point of fact, & ergo can be specifically restored & J Smith was guilty of no neglect, ought he to be liable?

The hardship of J case is another material objection to J doctrine, If J metal were destroyed even by J act of God, before any alteration made, J Smith wd. be liable accordg. to Jones doctrine.

In case of a mutuum - the articles, by J turning of J contract, are not to be returned to party delivering, specifically, (but only an equivalent) in any shape or form -

That here J identical value is to be returned, wrought into J body as you please, or whatever J utensil may be.

50.

In case of a mutuum, J barter, purchases J body, delivered to return an equivalent. Here there is injury &c. arise from J Smith's using it for J metal for another purpose, yet he has strictly no right to do so.

It is considered by Jones as a mutuum, in wh. case J Smith wd. be a purchaser. But it is not strictly a mutuum.

In J case of a mutuum, J rule wd. be undoubtably held - as where what is loaned is consumed or destroyed. Here J value is virtually a purchaser, & is liable at all events. 2 Bl. R. 404. 6. Pop. 58. Moore 20.

The L. Ct. & J. B. have rejected this rule. 17 Johns. 44.

When propy. is delivered to a bailee wh. is to perform some act of skill upon or about it in his professional character. -

- Hence I law presumes a two-fold contract on his part, It not only implies a contract yt he will redeliver it when I purpose of bailment is answered, but also yt I work shall be performed in a workmanlike manner, & I bailee by exercising I trade & labor himself out to I work as one skilled in that profession. 11 Co. 54. a. 3 Bl. 165. 6. 1 Flaud. 324. Esp. 601. Jones 120. 48. 37. 40. 1 H. B. 158. 9.

But if I act to be performed is not in I line of I bailee's profession or common avocation I law implies no contract on his part, yt I work shall be skilfully done, & ergo I bailee can't be liable, unless he made an express agreement. that it shd. be so done. 3 Bl. 166 Esp. 601. Jones 138. 40. 1 H. B. 158. Actn. my case.

If goods of this kind are delivered to a bailee & are lost or destroyed for want of I care - wh. is required of him by law, he is not entitled to wages for I labor previously bestowed upon them. This on principle seems to be I rule, tho. there is little aut. on the subject in I books. 3 B. w. 155. 5 Esp. 86

But if I labor shd. be lost after I labour had been bestowed, & with the bailee's fault, it wd. seem yt. he wd. be entitled to wages. 3 B. w. 159. 5 Esp. 86  
Hence if lost by I bailee's fault.



Common carriers have become so frequent  
now <sup>at</sup> ~~it~~ <sup>that</sup> ~~the~~ <sup>we</sup> consider them as very important.

52.

A com. carrier is any one in serv. who  
makes it his business to carry goods of another  
for hire; as a wagoner, a porter, a teamster,  
also a master of a ship employed in carrying  
freight. Le. R. 918. Jones 149, 151. 4 Co. 14.

Ray. 220. 1 T. R. 27. Esp. 519, 24. 1 Wm. 345, 35  
Stiles 90 Le. R. 330. Carney 1 law of carriers.

It seems formerly to have been doubted whether  
any other than a carrier by land came within  
the description of a com. carrier. The Law  
of subject was first extended in the reign of James  
II. to com. boatmen, & to ship masters in it  
by Car. II. Jones 148, 154. Hobbs 198.

Bro. J. 330. Le. R. 918. Mart. 190, 238.

22 Mod. 487. 2 Le. 19. Ray. 220.

53.

There is now no doubt of the liability of car-  
riers on the water. 1 Le. R. N. S. 313, 14.

The masters of ships carrying goods for other  
persons are com. carriers, & in case of a  
loss, the action may be brought either against the owner  
or the master. In strictness, the owner alone, at  
least, will be liable, as the master is his servant.

But there are many reasons which render it just &  
necessary that the master should be liable.

The judges have often known nothing of the owner.  
Stalk. 440. Leath. 3 Le. 259. 1 T. R. 18, 78.

Exp. 522.

By 3 Eng. Stat. 7 Geo. 11<sup>th</sup> & 26 Geo. 3<sup>d</sup> it is pro-  
vided that when loss has happened by fire or incon-  
venient of the master or mariners, the owners shall  
be subjected to the value of the ship & freight,  
tho' the master sh. be liable in the whole.

1 D.R. 18.78. Month 180. 1 Del. 309. 10.

2 Com. C. 286. 9 Abb. 231. Insurance 32.

If a com. carrier, having convenience  
to carry goods of another, & having him  
tendered him, refuses to carry them, he is  
liable to an action on the case; for by assum-  
ing this public character he implicitly  
holds out an offer to carry for any one  
willing to him. He is then in an im-  
plied contract to carry them.

Bull. 70. 2 Bae. 180. 2. 99. 2 Bl. 160.

2 Phos. 327. Kerney v. S. 9. 9 B. 72.

Hard. 103. 3 Bl. 166. 1 Bl. 244.

But tho' a com. carrier is bound to receive the  
prop. as mentioned in the last rule, yet he is at  
liberty to make a special or conditional ac-  
ceptance. The law allows him to say that  
he will not be answerable for a package  
if he is told what value it contains, & is  
promised it a reward proportionate to the risk  
shall be given him, & he may demand it  
before-hand. 4 Burr. 2280. Exp. D. 622.

The bailment here being advanta-  
geous to both parties, it wd. follow if there  
were no circumstances to impede the applica-  
tion of the general principle, that a com. car-  
rier sh. be liable in nothing less than ordinary  
neglect - & this way the case is late as Hen. & Th.



In 3 reign of Eliz. it was settled that a robbery was no excuse. But 3 rule at that time extended no farther. 1 Inst. 89. a.

Jones 144. 5. 4 Co. 84. a.

The rule now is, 3t 3 com. carrier is liable for any loss, occasioned in any manner, except in act of God, or of public enemies or of bailor. Bull. 20. 1. 4. Co. Ray. 918.

3 B. 1000. 1840. 1 Tra. 128. 1 D. R. 27.

Halk. 18. 1 Wils. 281. 1 Inst. 609. 1 Esp. 613. 21.

Jones 144. 5. 6. 1 Do. 255.

It will be seen 3t 3 liability of a com. carrier is extended far beyond 3t 3 other carriers, where 3 bailor is advantageous to both parties, & 3 distinction is founded on public policy.

56. A great part of 3 commerce of 3 world is carried on by com. carriers, & if their liability was exactly 3 same as that of bailor, they wd. have it in their power to commit great fraud by collusion among themselves. Strangers are under 3 necessity of trusting them, ergo, there ought to be 3 strictness regulation, for 3 protection of commerce.

See. Locke suggests a diff.

reason (viz.) because 3t 3 goods wh. they receive. But 3 same holds up to private carriers, & that he shd. receive a reward if necessary, to constitute a com. carrier. 4 Co. 84. a. Halk. 193.

1 B. 1000. 1 D. R. 24. 1 Co. 918.

" Jones 148. 1 Esp. 2. 1 Inst. 609.

A com. carrier is not liable to this extent, unless it is said or is to be so. - for if he carries gratuitously he does not act as a com. carrier.

but as a mandatory. *Barth.* 483. *Exp.* 621. 1 *Do.* 609.

If com. carrier is considered as an insurance, except in 3 cases th<sup>t</sup> act of God. In other cases he is liable.

If then goods are lost by any cause above human control, he is excused. 1 *D.R.* 33. *Atta.* 118. \* & this is the principle upon which a writ of God.

And it has been determined th<sup>t</sup> fire is no excuse to a com. carrier - as in *London* in 1666. *H.R.* 113. *Exp.* 620. 1 *D.R.* 34. If by lightning it is an excuse, but not if by accident or an incendiary.

*Exp.* 620. 1 *Do.* 203. 2 *Do.* 254. *Do.* 2491. *Barney* 24. 2 *H.R.* 113.

In carrying by water, it has been held th<sup>t</sup> water flowing thro<sup>g</sup> side of a ship, is not excuse of carrier. The same rule forming in floods. *Jones* 147. *Do.* 20. 1 *Do.* 203. 1 *Do.* 281.

If com. carrier is not excused in case of <sup>contingent</sup> fire, but is liable in case of <sup>private</sup> fire.

But not in case of fresh-water rivars, as in *Harbors* *rivars* &c. 1 *D.R.* 18. *Exp.* 621. 1 *Do.* 190.

239. 1 *Do.* 85. *Jay* 106. *Abbott* 208. 27. 1 *Do.* 2587.

If a tempest at sea makes it necessary to throw goods off a vessel on board, the carrier is excused, for th<sup>t</sup> immediate act is not act of God, & necessity was occasioned by act of God.

*Jones* 156. 2 *Roll R.* 79. 2 *Do.* 280. *Exp.* 620. 12 *Do.* 63.

1 *Do.* 203. 1 *Do.* 43. 2 *Do.* 589.

Where a box is found to be over-weighed, and it was held th<sup>t</sup> the carrier is not excused for such a box could not affect the ship's navigation, & being light was no necessity for throwing it over. Decision must have been upon necessity, & not law. *Allen* 93. 58.



There is no doubt it is known overboard to have  
ship. The goods must be averaged among  
owners, master, & other freighters, but  
not passengers. Marsh. ins. 466. And this  
is in Law Merchant, & Maritime L. for it was for benefit of  
all. 3 Buss. 557. S. 2 D.R. 407. Peacock, 178 Lex. merc. 138.

Passengers are not liable for cargo except by negligence. 1100. East 120.  
And if a com. carrier exposes property to  
act of God &c. he is not excused, but is  
liable, it is his fault yet if property was  
lost within 7 days.

1100. East 120. 1 Cont. R. 384. 428.

But if com. carrier is excused, when the loss  
was occasioned by act of God & bailor is  
self. 22. At pipe to mine but in bond  
a wagon by bailor while in a state of  
permanence, & in consequence burst. Bull 69.

1100. East 120. 384.

59. And if a carrier's wagon is already full,  
& bailor forces goods upon him,  
carrier is excused, for it is bailor's fault if they are  
lost. 1100. East 120. 384. 428. 120.

As in case of Innkeepers where guest insists &c.

But if goods must have been kept while  
in his protection, or when under his im-  
mediate control, in order to subject carrier.

And it has been determined, that where  
a carrier has goods on board or has or  
about with his servant to take charge of them, & carrier is  
not liable for loss that may happen. not as a com. carrier (17.)  
Bull. 69. 1100. East 120. 384. 428. 120. 138. 139.

But this means yet he is not liable to the  
extent of 7 days. note. but if it is his fault or neg-

lost or misappropriated to his neglect, & goods are lost. carrier not liable as com. but as private carrier. (J.F.)

And so in similar matters respects a passenger to take oversight of his goods. This doesn't excuse & exonerate him. They are still under his control. Roll 2. line 1. 250.4. Dec 1. 17.

It is so. a com. carrier - the ignorant 60.  
of contents of a box. &c. is liable, in the discharge of himself by a special acceptance.

Decisions in case of a depositing. Bull. 70. 2 Sept 128.

Extra. 148. Length. 485. esp. 822. & Brown. 2298. 1783. 298.

Jones 148.

And accordg. to 2 decisions tho. carrier is misinformed of contents by owner is still liable in the acceptance specially. In one of these cases owner told carrier of box contained value of small value, when in fact it had money. but still carrier was held liable. Allen. 93. 1 West. 238. 1 Mac. 345. Bull 70. Jones 148.

In other case owner so. box had a book 61.  
& some tobacco, when it contained £100. it was so. it was so. 150.  
& held 155.

Both these appear to be to every principle of justice. The books say that he (is) supposed to every principle of justice may discharge himself by a special acceptance i.e. in the present case by saying, I will not take your word, that box contains only books &c.

Lord Mansfield has expressed his disapprobation of the rule, & his late opinions of Lord King & Lord Kenyon are also opposed to it. 4 Burr. 2500. & extra. 145.

1 East 610. a later decision. 205. 8.

These cases J.F. thinks not law - Jones 148.

It is so. delivery B. a box containing £1000 telling him that it contains £100. there is a fraud practiced upon carrier. The amt. is concealed in order to diminish price. The carrier has no opportunity of knowing the amt. & certainly can't be considered a bailee of £900. He



is liable for £100. So far as he is informed, so far, he  
ought to be liable. He is in the nature of an insurer vs.  
risk. Jones 148: Esp. 621. Bull 701.

In a promise to making a special acceptance  
it is not necessary, it should be a bona  
communication, ex. advertisement, but  
there must be qualification.

An advertisement in a public newspaper may be  
sufft. to constitute a qualified acceptance.  
But whether it is or not depends upon whether  
the owner had notice of this advertisement or not,  
& this must be left to the jury. Bull. 71.

4 Burr. 2298: Carth. 458. 1 H. Bl. 298. 300 n.  
Post 64. Esp. 622. Selw. 508. 8: 4 Campb. 820. 531.

62. Under a genl. acceptance except in case of  
fraud the carrier is liable for what he receives,  
but under a special acceptance he is liable  
for so much only as he agrees to carry.

In this case the carrier's reward extends to no  
more than is embraced in the special acceptance.

As to any thing to sh. his reward does not  
extend, he is not a com. carrier, & consequently  
is not liable as such. Esp. 621. 2. Carth. 485.

Bull. 701. 1 H. Bl. 298. 2 East 194. 4 Burr. 2298.

Selw. 508. 8: 4 Campb. 40. 531.

63. Then in the case in H. Blk. the owner having con-  
coaled the value, the carrier was held not to be  
liable at all, but in that case there was a  
special acceptance, by the terms of wh. he was not  
liable. Carth. 485. Esp. 620. 4. 4 East 371. 62.

Bull 701.

The carrier so. he so. be liable for no part of

informed of the whole, & this being reasonable condition, the Ct. allows it.

A master of a stage coach who receives freight for passengers only & not for goods, is not liable, as a com. carrier, tho if they are lost by his fault he is liable, or if he receives a reward for goods. Com. Pl. 25. 1 Bac. 333, 4.

Bull. 30. Rep. 622, 3. 2 Show 128. Chalk. 222.

Tho a com. carrier is not liable for more than his reward extends to, yet he is liable with actual freight made before hand or with any express promise of freight, because he may recover his hire upon a "quantum meruit". He is not bound, however, to receive goods without payment. 1 Bac. 333. 1 Show. 302. 2 Show. 81. Pl. 9. Bro. 1. 262.

If notice is given to the bailee, limiting his liability, put up in a conspicuous place in his office dispenses with the necessity of personal communication with the bailor - & will give the jury reason to presume that the bailor understood the terms.

To charge a carrier it is not necessary that goods be lost "in transitu" for if they are lost at any time before delivery he is clearly liable, & if goods are not delivered & are lost he is liable in he can prove that an established custom is not to deliver, not to deposit at any place. The only lies on him. He is liable of course until delivery, in he can prove that he was not



bound to deliver. 2 Bl. R. 916. 3. Wils. 429. Esp. 623.  
1 Bac. 345. 5 T.R. 38. 3 Day 364 3 Cont. 13.

If goods are directed to B. They are to be delivered, & carrier is liable till such delivery, (i.e.) he is liable prima facie.

65. When (question) custom is for carrier, not to deliver goods to consignee, but to keep them in store for him, he is not liable as a com. carrier after they are deposited in his store. 4 T.R. 581. Esp. 623. 2 Ash. 271.

But if he keeps them as a depository without a reward for storage, he will be liable as such.

If he keeps them for a reward for storage he will be liable as a hirer, & liable for want of ordinary care. 4 T.R. 518.

Qu. Does not price of carrying include custody? & if so he wd. be liable as a bailee of 3 3<sup>d</sup> class.

Of delivering goods on a dock. See 1 Hble. 302. 15 Ash. 39. 11. 107. 1 Bac. 345. Owen 37. 2 Bawson 914. 5 T.R. 396. 2 Com. 400. 272. &c.

If consignee of goods direct by what carrier they shall be sent, he & not the consignor will be entitled to action, for he is 3 bailee. 8 T.R. 330. 3. Esp. 540. Bul. 35.

3 Campb. 254. Campb. 293. 1 Bos. 333. 33.

If consignor selects he brings 3 action.

Whenever a consignor makes himself liable for price of conveyance & takes upon himself the risk & is entitled to an action even though the consignee selects a carrier. 8 J.R. 333. 1 Do. 435. 52. Bull. 30.

5 Burr. 2080. 1 T.R. 509. 1 Selw. 418. a.

The consignee by either of these acts becomes a principal in the contract of bailment.

If one sends an order for goods without naming a carrier, or if a vendor delivers them to a carrier they are at the risk of the vendor. 5 D.R. 320.

14th. 248. 1 B.R. 381. 2 Warr. 45.

10 J.R. 4. 1 Do. 42. 1 Selw. 311. 12 Rich. 252.

The reason is that the consignee becomes a party to the contract merely.

When an action is brought by ship-owners as common carriers it has been held that they must be joined - it must be brought against all when it is "joint" - In it is "quasi ex contractu" 10alk. 440. 10p. 623. 5 Burr. 2611. 14. 5 J.R. 648. 51. 12 Selw. 1098. 3 East 6270. 1 Selw. 315. If nonjoinder & misjoinder of ship owners see 5 Burr. 2611. 19. 2 Do. 947. 1 Haund. 291. b. "Flag" & 7 Rich. sounds in contract they must be joined - but if it sounds in tort they need not be so joined.

By 7 C.L. a postmaster was liable as a common carrier for letters, money &c. intrusted to the mail, for by 7 C.L. he was acting in a private capacity. But since the establishment of a genl. Post Office by Stat. 12 Car. II. the postmaster has ceased to be considered a common carrier. He enters into no contract with private individuals. 1 Salk. 17. Ld. Rd. 646.

10p. 764. 8754. Jones 153.

"Action on case" 18. 10p. 42.



It is <sup>essentially</sup> ~~indiv.~~ & character is a com. carrier  
of the sh. receive him from individual who  
employs him.

But a post receives left. as agent for govt.  
in their use, besides no one wd. require so  
great responsibility as Post master's Id. if  
they were liable as com. carriers.

67.

From & nature of his character he is not  
liable to an individual for default of his  
subordinates. They are & officers of govt.  
He is liable to & individual injuries for  
his own neglect, & so are his subordinate  
officers, but no farther. 3 Wils. 443. Corp. 208. 1 Burr. 518.

Common carriers are so. in & books to be li-  
able on & custom of & realm but this is totally  
unnecessary. In & custom being universal, it  
is part of & R. L. The custom of & realm  
is known to & Judges ex officio.

1 Sess. 245. 1 Bacc. 333. Holt. 18. 1 D.R. 33.

2 Mod. 227. Jones 130. Hawk. 136. Ward. 235. 6.

The usual mode of securing is in & Assumpsit  
1 Holo. 314. 15. 3 East 62. 4 Toulson R. 820.

When property is stolen from a com. carrier or  
otherwise lost, so as to subject him, he being  
guilty of no misfeasance, & only remedy vs.  
him is a special action on & case. He is  
liable on & grounds of neglect only.

"Prover" will not lie for there is no mis- 68.  
feasance, tho' if he were guilty of an act of Bailment  
at misfeasance "Prover" wd. lie. 22 Lark. 35. No. 3.

8 Co. 146. Holt. 251. 5 Burr. 2827.

5 Bac. 257. Esp. 589. 90.

He may make himself liable to both  
actions. 12 Lw. 315. Dent. 89.

14 Am. Carrier has a lien upon goods  
etc. 2 L. R. 252. 867. 5 Bac. 203. 2 M. R. 84.

1 Ball 48. 1 Selw. 311. 10 T. 1. 9. Esp. 199.

The genl. L. as to Inn Keepers will be con-  
sidered hereafter, but it is necessary here <sup>Liability</sup>  
to treat of their liability as bailees of their <sup>Inn-keepers.</sup>  
guests goods.

14 Delivery of goods to an agent of an  
Inn Keeper seems to fall under 2<sup>d</sup> genl.  
division of 3<sup>d</sup> class of bailments.

14 Delivery of goods in this way is a bail-  
ment to a person exercising a public employ-  
ment for a reward.

Espinasse classes a delivery to an Inn-  
keeper as an accommodation or lending gratis. 69.

But 2 kinds of delivery do not resem-  
ble each other in any other respect than, that  
they are both bailments.

14 Lending gratis is a lending for use of  
bailee only, & a borrower considered as such  
is always a private bailee. Esp. 625.

Justice Buller classes this  
incident under 1<sup>st</sup> division, (i.e.) a mandatum.



It is mandatory as such is always a private bailee. He receives & goods to take care of them gratis.

But an Inn-keeper is always recommended for care i.e. he receives directly a price for keeping, and even for inanimate things, he is rewarded by another gainful contract, by wh. he is bound to entertain his guests. The day for a room or chamber has reference to & storage. Bul. 73. Jones 130.2.4.

70.

The bailment in this case being advantageous to both parties, & Inn-keeper is according to a genl. principle liable to ordinary neglect only. But a policy of law has extended his liability somewhat further. It seems to be a prevailing opinion that an Inn-keeper's liability is co-extensive with that of a com. carrier.

But I know of no express authority to that effect. He is clearly liable for any loss occasioned by servants in any way. The law on this subject is intended for the benefit of travellers they being in genl. strangers to him & exposed to danger in losing their goods, if he were liable to them.

8 Geo. 3. c. 2. Bul. 73. 1 Bl. 430.

Jones 133. 3.5. a. b. & c. 626.

71.

According to a genl. rule he is also liable if goods have been stolen by a stranger, whether there has been neglect or not. He is not excused here by ordinary care as he wd. be by a genl. principle.

Jones 134. Cro. J. 187. 223. 8 Geo. 3. c. 2. s. 7. R. 276.  
L. J. thinks it a policy of law requires that

he shd. be liable as com. carrier, tho he finds nothing to this point.

This rule does not hold if  $\gamma$  goods have been stolen by  $\gamma$  guests own servant, or by his travelling companion, or by any other who lodges in  $\gamma$  room with him by his own request &c.

Bro. C. 285. 8 Co. 33. a. 1 Bac. 183. 4 pp. 625.

It wd. seem yt Inn-keepers are liable for 72. losses occasioned by com. robbery, tho on this subject there do not seem to be any authorities yt are conclusive. In Flood. 9 it is sd. yt if  $\gamma$  Inn be broken &  $\gamma$  goods taken by  $\gamma$  king's enemies  $\gamma$  Inn keeper is excused. In assigning a reason for this rule it is sd. to be that such force is supposed to be irresistible. Jones (155 a. c.) says yt he shall be excused if  $\gamma$  force be truly irresistible. Now this seems to imply, yt he wd. be liable for any other robbery.

The conclusion from  $\gamma$  authorities it wd. seem must be yt for a robbery committed by a small party he wd. be liable, but if it were by a large party as by mob or insurgents he wd. be excused.

Hence it appears yt he is not liable to  $\gamma$  extent of a com. carrier - tho  $\gamma$  authorities are not conclusive. 8 Co. 32. a. b. 3 Bac. 182.

4 pp. 626. 7. Que 1. G. June 1.

By  $\gamma$  Roman Law nothing less than inevitable accident excused him, & our law is very like it being deduced from it, almost word for word. 162 a. m.



It do. seem yt if Inn-keeper is not lia-  
ble in there is some default in himself or  
his serot. But this is not Law & it is ex-  
pressly denied by J. Bullen. & Co. 32. 1. Sup. 6267.  
5 J.R. 276.

The Inn keeper is liable only in such goods  
as are infra hospitium. But this inclu-  
des his out-houses & stables. & Co. 32. 1.  
12. 6267. 4. Hawley & Tels. 3.

If 3 goods of a guest are removed from an  
Inn by his own direction & lost, & Inn keeper  
is regularly not liable - - as if a guest orders  
his horse to be sent to a pasture wh. is open  
& 3 horse is stolen & Inn keeper is not lia-  
ble. & Co. 32. 1. Roll 4. Bull 73.

But if & Inn keeper put him in with. & 3  
consent of a guest. & 3 horse is stolen he is lia-  
ble for it is his own fault yt 3 horse is not  
infra hospitium. Bull. 73. Roll 4. 12. 62.  
& Co. 326.

74. It may be observed yt if a guest orders  
his horse to be put into a pasture & he es-  
capes & is lost for want of a supt. fence &  
Inn keeper do. be liable on 3 grounds of or-  
dinary neglect. tho. not by 3 rule founded  
on Statute. date 18. 23. 22.

If damage is done by 3 builder's neglect,  
& innkeeper may sue him in "assumpsit" on 3 agreement  
either express or implied or in tort for the  
neglect & date 62. 1. 12. 282. 22. 319.

But in this case neither "detinue" nor "trover" will lie, for there is no unlawful detinue or actual misfeasance.

## VI. Class of Bailment. Mandatum.

Mandatum or mandate is a delivery of goods to be carried, or some other act to be done to them without a reward. This species of bailment is sometimes called acting upon commission. But the expression is grossly improper & the proper name is mandate. *La. R. 918. Bul 143.*

As carrying &c. is gratuitous, the only diff. between this & a deposit is, that one is to do some act, & the other is to keep some article. *Bull. 173. 1 Dow. C. 254.*

If Bailment of this kind being so 75.  
advantageous to the bailor only, the bailor is liable according to the genl. principle for nothing less than gross neglect, & such is the law.

*La. R. 909. 914. 1 H. B. 158. 61.2.*

*1 Dow. C. 253.4* (There are some qualifications.)

But where there is an express agreement by the bailor to use more care than is required by the genl. principle, & the loss happens by the omission of that care wh. he agreed to exercise, he is clearly liable.

But this is on account of his express agreement. In respect he wd. be liable for gross neglect only. *ib. et. June 25. 1 Dow. C. 255.*

*La. R. 219. 1 H. B. 161.2.*



Such an agreement, to use all necessary care & skill may in certain cases be implied, but under what circumstances will be considered hereafter.

An agreement, then, if this sort will subject a mandatory in less than gross neglect according to an agreement. The omission of a stipulated care will be considered as gross neglect.

It seems if he does not stipulate in extraordinary cases. 1 H. Bl. 158. Le. Pl. 919. *infra*. Longbrough.

Indeed an agreement, allied to gross to confound all distinctions of care, & if such doctrines be correct all the rules w<sup>d</sup>. be abolished. This seems to be the opinion of Le. Pl. 1 H. Bl. 158. 1 R. 40. 255.

Long 85. Le. Pl. 919.

77. J. G. Cant be brought to assent to this doctrine.

An agreement, if a mandatory to use all care & skill is not implied in this bailment, unless a act to be done is in the line of his professional business. 3 Bl. 185. 0. 1 H. Bl. 155.

This seems to be a true rule. But Long says that this bailment, from its nature, it implies this agreement. but is not supported by authority. 3 Bl. 185. 1 H. Bl. 158.

Long 94. 5. 16 East 78. 11 East 4. 1 R. 40. 255. 277. 281. 601.

Long maintains a distinction between a duty of a bailee where it is mere possession (i.e.) performing some act, & where it lies in keeping & carrying only. By possession he means labour.

He says that where a bailee carries with him  
ware he does not implicitly promise to use  
all care & skill Jones 61. 20. 2. 3. 4.

Contra. all principle & analogy & 3 Bl. 105. 14. 136. 158.  
Jones 87. 5.

He says tho, that where a bailee undertakes to  
do any other act, as to unload a ship he  
implicitly engages to use all necessary skill &  
care. Jones 8. 93. 4. In imposed distinction J. C.

But where there is an engagement, express 78.  
or implied to use all care & skill &  
bailee is liable for gross neglect only.  
Jones 74. 1 Don. C. 255. 6.

A merchant engaged to enter at a customs house  
goods of B. with his own & to do it gratuit-  
ously. He did it but made a wrong denun-  
ciation in consequence of which they were for-  
feited. He was held not liable because his  
own goods were lost on a same account & since  
there was evidently no fraud 1 H. Bl. 158.  
1 Don. C. 255. 10 Bl. 105. 6. Jones 149. 50. Exp. 601.

He did not engage to use all necessary skill  
or to possess all necessary knowledge.

Jones agrees that a cont. to carry goods 79.  
does not imply a promise to use all necessary  
care & skill. Jones 72. 87.

It has been observed that a law implies  
an agreement to use all necessary care & skill, on  
a part of a mandatory, when a act to be done  
is in a line of his professional business but  
this implied agreement extends only to a person



or doing & act & no farther.

There is no implied agreement to use all care & skill in keeping &c. for if I goods shd. be lost & mandatory wd. be liable only for gross neglect. Thus if a tailor engage to make a garment gratis & law implies an agreement to do & work skillfully, but not to keep, &c. *Le. Rd. 918. Bull. 73. Dow. 255.*

80. Even an express agreement by a mandatory to use all necessary care & skill will not subject him for losses occasioned by act of God or public enemies or of a bailor  
*Le. Rd. 918. 4. 15. Jones 62.*

But it wd. seem on principle that a bailor can't even by express agreement exempt himself for losses occasioned by his own fraud or torts. It is contra bonos mores *ex. vs. Law Jones 66. 75.*

81. It has been observed, that according to some authorities, omission of stipulations concerning gross neglect. This was disagreed to.

But whether it be true or not on delivery to a bailor & delivery binds him as a contract so that after goods are delivered to a mandatory & engagement on his part express or implied binds him as a contract. But he is not bound before delivery.

If I promise to build a house for a man & at the same time refuse to do it, we can't compel me for it is *in idem pactum*.

If I promise to carry goods for A. B. & at the same time refuse to take them I am not liable, not after

having taken J's. certainly be bound to carry them. *Ld. Rd.* 920. 5 *J.R.* 143. *Co. J.* 667. *Doct. & Tit.* 129.  
1 *Rob. Co.* 164. *Ld. Rd.* 909. 10. 12 *Mod.* 487. *Yelv.* 4. 128.  
*Chancery L. Ins.* 207. 1 *Exp. R.* 74. *Actn. in cas* 77 *Tresp.* 46.

The opinions are not all coincident on this point. But besides 3 above authorities there is a case directly in point viz. 94. *Delivered money to B. & B. promised to deliver it over to C. 94. failed to deliver it over to C. & 94. recovered of B. in "Assumpsit."* 82.  
*Yelv.* 128. *Co. J.* 667. 8. 10. *Mod.*

*James* says 3 liability of 3 bailie is founded on his gross neglect & not on 3 promise.

*Ld. Rd.* 910. 19. 3 *East.* 62. 3 *J.R.* 149. 50.

*James* (1580.) says that where special damages accrue on account of 3 promise not to bring 3 goods according to agreement, an action will lie though cost be gratuitous. The damage must accrue if at all on 3 breach of 3 contract. But this wd. be "damnum absque injuria". The question of damage cost arise until 3 question of contract has been settled. It wd. be beginning at the tail end for it wd. be useless to 3 party's right to damages, before it is ascertained whether 3 action will lie.

Besides 3 case which *James* supposes will not support damages even if 3 action wd. lie. It is not law.

4 *John.* 84.

On 3 other hand where 3 goods have been delivered 84. no special damages are not necessary to support 3 action.

The law presumes damages from 3 breach of 3 contract.  
*Ld. Ray.* 909. 10. 19. 20.



It is so. y<sup>t</sup> an action vs. a mandatory, dis-  
gertaking being gratuitous, is founded upon his  
neglect & not upon his promise express or im-  
plied. Jones 16. Roll 10.

If this is y<sup>e</sup> case how can an ex-  
press promise extend to liability.

He may certainly make himself an insurer vs.  
all risks, but if his express promise do not  
bind him, as such, how can he become <sup>more</sup> liable  
than witht. one?

There is no foundation for this opinion.  
Jones cites Roll, but it is doubtful whether  
he supports his position. It seems to be y<sup>e</sup>  
spirit of all y<sup>e</sup> authorities y<sup>t</sup> he is liable on  
y<sup>e</sup> promise. (Jones 86 contra. 2d. Re. 402. 19.

S. T. R. 140. 2. 150. 3 East 62.

### Genl Rules.

A lien is understood to be  
a direct claim to or incumbrance upon some spe-  
cific property of another as security for some  
debt or duty accompanied with possession. 1 East 4.

If this definition is correct it so. seem  
y<sup>t</sup> a lien exists only in favour of creditor of  
y<sup>e</sup> 1 2 3 4 5 classes & not all of y<sup>e</sup> 5. 1 East 4.

3d. It is true y<sup>t</sup> a owner has a right to de-  
tain y<sup>e</sup> goods, but this is not a lien. It is a  
specific property not an incumbrance to secure  
a debt. 1 East 40.

In y<sup>e</sup> case of a depositary & mandatory there can  
be no lien. The bailor may counter-

mand & delivery. Whenever he pleases. Esp. 587.

3<sup>d</sup> Bailor of 3<sup>d</sup> kind always has a lien.  
In 3<sup>d</sup> case to a pawn, a lien is created by 3<sup>d</sup> del-  
ivery. Bro. J. 244. 5 Yule. 178. Talk. 322.  
Duce. in Ch. 419. Esp. 583.

3<sup>d</sup> Bailor of 3<sup>d</sup> kind have also a lien  
i.e. a right to hold 3<sup>d</sup> goods entrusted to them  
for their hire or reward. But this is not 3<sup>d</sup> case  
with all bailors of this class. 3 Bac. 185. 186. 42.  
This lien is created by a condition in law.

3<sup>d</sup> person who obtains property of 3<sup>d</sup> goods  
wrongfully from 3<sup>d</sup> bailor has no claim to  
this lien. 3 East 585. 2 B.R. 264. or 85 Talk.  
654. Ante 38.

3<sup>d</sup> Common carrier has a lien until his  
hire is paid. Le. Mayd. 282. 5 Burr. 2828.  
2 B.R. 64. (Contr. Le. Mayd. 267. not  
law.) Talk. 654. 5 Bac. 269.

And it is laid down by Le. Mayd.  
that if goods are stolen & delivered to a com.  
carrier, 3<sup>d</sup> latter may detain them even w.  
3<sup>d</sup> owner until his reward for 3<sup>d</sup> carriage of  
them is paid, for as a com. carrier he is  
bound to receive them. Le. Mayd. 267.

3<sup>d</sup> Innkeeper may detain 3<sup>d</sup> person of  
his guest for 3<sup>d</sup> payt. of his bill (i.e.) his  
whole bill viz. for house, self, &c. He has a  
lien upon his person, for he is bound to receive  
him. 3 Bac. 186. 2 Roll 85. 1 Wms. 269.

Draper & Perot. 24. Post 88.



He may also detain a horse up to his right  
until his keeping is paid for. But a horse can't  
be detained for a payment of a week's entertainment.  
The owner however may be detained until the  
whole is paid. 1 Bac. 203. La. Rags. 808. East. 180.  
3 Bulst. 208. Bull. 75. 8 Co. 147. Walk. 388. E. 50. 504.

87. And an inn keeper may detain a horse even  
the foot of a person not a true owner & may  
retain vs. a true owner until his keeping is paid  
for. It is not his business to know a true owner  
but it is safe if a horse has been kept on his  
premises. 1 Wils. 17. 1 Bac. 183. Popk. 128. 75.  
1 Chas. 203. Eop. 554. 2 Roll. 85.

But a Inn keeper loses his lien by voluntarily  
permitting the horse to go out of his possession.  
Indeed this is a rule with regard to all liens  
upon personal property. It is essential  
to all such liens. A lien is a right to de-  
tain, & necessarily refers to that which is already  
in possession. 1 Tra. 558. Rob. 2. 584. 1 Binn. 295. 4.  
Lien is that, every reason diff. (except 4) of this  
nature.

Most private tailors of 3<sup>d</sup> class have also  
a lien. A tailor or other mechanic to whom goods  
are delivered has a lien till a price for so do-  
ing is paid. It is true yet he is not bound  
to receive a goods & his lien ergo can be gained  
on this principle. 8 Co. 147. H. 42. Kel. 57.

It is said to exist for the pro-  
motion of trade. It is however a tailor is in a habit  
of trusting a builder he ought not to detain with-  
out giving notice; for he is presumed to have done  
a work on a personal credit of a builder. 1 Bac. 246. 10.  
(It is conceived he must.)

On the other hand an aging farmer can't see 88.  
him & propy. committed to him untill paid.

The reason is 1<sup>st</sup> That he is not bound to  
receive them & 2<sup>d</sup> The interest of trade & commerce  
is not affected by it. Exp. 585. Bull. 45.  
Cro. & 197. 1 Dec. 240 n.

The Capt. of a Ship has no lien upon her  
for his wages & stores; for he is bound to trust  
to the personal credit of the owner. If he had  
a lien he might make a very improper use  
of it to the great injury of the owner; for in-  
stance he might keep her in a foreign country  
to enforce his lien untill she became useless.

Flahe. 33. Young. 97. La. R. 632. 576.  
12 Nov. 440. 400. 1 Dec. 49.

The mariners, however, have a lien upon her; 89.  
for they are supposed to contract upon the credit of  
the ship, & there is no damage to the ship to be  
apprehended from them; for tho' they libel the  
ship in a foreign port of dominion & have her  
condemned & sold for their wages, the master has  
only to go & pay them off.

He is the person to whom they are to look for  
payt. 346 bot 459. 1 Dec. 937.

In all cases where there is a special or  
express agreement on wh. the bailer relies for his  
reward he has no lien.  
It has been decided in the case of a Harrier who  
claimed a right to detain a horse untill paid  
for his cure, that an express promise on  
the part of the owner, to pay a certain sum for  
the cure, ousted the Harrier of his right to detain; be-  
cause it was held that the Harrier relied on the express  
agreement, & it comes with the maxim "expressum facit



cessare taciturnum. Nels. 56. 5. 271. 2 Roll. 92.  
Esp. 585. 6. Not Law this agreement. regarded only  
7 sum to be pd. - Had it gone so far as to ex-  
clude 3 lien (i.e.) to negative 3 right to retain, 7  
lien so, have been lost. 14.

Quere - (Wheat 1071 denied)  
2 Marsh. 345. 7. Button vs. Gray.

Jt. factor has a lien upon 7 goods in his  
possession. 3 T.R. 119. Com. Throckt. 13.

5 T.R. 604. 40-10. 254 Burr. 228. 2 Roll. 1153.  
2 W. 108. (Master & Servt. 124 "agent")

90. With regard to 7 other carriers than those of the  
4th & 5th classes, tho they all have a special  
interest some higher some lower, yet none of them  
have a lien. There is nothing to be secured,  
for they are entitled to nothing. They have a right  
to retain only according to agreement. 1 Roll. 118.  
1 Bac. 240 7 W. 146 would a duty to be secured  
secured

If one man bail 7 property of another it is  
7 7 bailor must deliver 7 property to 7 bailor  
according to 7 terms of 7 contract, because it is so. 7  
7 bailor can't know of 7 ownership, & shd. perform  
his contract. 1 Bac. 237. 1 Roll 600. 7. 1 Bac. 242.

The ant. of 7 rule is 7t Jt. bail 7 goods of  
W. to J. 7. J. 7. is obliged to deliver 7 goods back  
to 7t. but it seems unaccountable that he shd.  
be liable to 7 bailor if he delivers 7 goods to the  
true owner. And 7 rule appears to mean 7t the  
bailor will be justified in delivering 7 goods  
back to 7 bailor. The rule shd. be expressed  
thus that he "may" instead of "must" 1 Roll 607.  
1 Bac. 242. 7 W. 157.

That such is  $\bar{z}$  rule appears from a rule given afterwards viz.  $\bar{y}t$  if  $\bar{z}$  bailor delivers  $\bar{z}$  goods to  $\bar{z}$  bailor pending an action  $\bar{z}$  goods  $\bar{y}$   $\bar{z}$  owner, such delivery will bar  $\bar{z}$  action. It is evident from this that he will be justified in  $\bar{z}$  delivery to  $\bar{z}$  bailor, & not  $\bar{y}t$  he must deliver it to  $\bar{z}$  bailor.

The true owner may claim  $\bar{z}$  goods wherever he may find them, except, in Market overt.

1 Bac. 242.

This explanation seems to be justified by rule  $\bar{y}t$  if a thief gives goods to a com. carrier  $\bar{z}$  latter is not bound to deliver them until his reward is paid. But he must give them up to  $\bar{z}$  true owner on tender of  $\bar{z}$  hire. If then a bailor must give up to  $\bar{z}$  true owner a portion, a private one must. 2d. Rd. 867. 1 Bac. 227. 1 Roll 607.

It seems  $\bar{y}t$  in such case if  $\bar{z}$  bailor dies & his exec. comes into possession of  $\bar{z}$  goods, he must deliver them to  $\bar{z}$  true owner at his peril. He can't discharge himself by a delivery to  $\bar{z}$  bailor who is not  $\bar{z}$  owner.

The reason given is  $\bar{y}t$   $\bar{z}$  exec. having come into possession by act of law is entitled to  $\bar{z}$  possession.  $\bar{z}$  exec. not being bound to  $\bar{z}$  personal trust of  $\bar{z}$  testator. 1 Roll 607.

1 Bac. 237.

This reason is very technical & I doubt very much whether he is not justified if he delivers them to  $\bar{z}$  bailor.

I and think  $\bar{z}$  liability of  $\bar{z}$  testator is  $\bar{y}t$   $\bar{z}$  exec. they devolve upon him. 1 Roll 607.



In pursuing this subject of how far the rights of strangers are affected it is necessary to consider the rights of the bailor or creditor who rely upon the property supposing it to be his & of purchasers who purchase under the same circumstances. It is a very important part of the title.

The law on this subject is in a great measure regulated by the Stat. 21 Jas. I. which is in affirmance of the common law.

By this Stat. it is provided that where a person becomes a bankrupt, if he has in his possession or disposition goods of another with the consent of the owner, these goods are liable to be taken for his debts & may be levied upon by any of his creditors. Thus if a purchaser of a stock of goods puts them into the possession of B. to trade with as his own, & B. becomes a bankrupt, these goods are liable for his debts.

It gives the vendor or bailor a false credit.  
9th. 156. 1 Rep. 348. Dougl. 503. 7 B.R. 228.  
8 B.R. 82. 1 Esp. 566. 1 B. & P. 82.

Same rule as to insolvents in Court. & in this country generally. See supposers.

This provision of the Stat. is founded on the apprehension of false credit with the public. It is thought more reasonable that the bailor who has enabled the bailee to occasion loss should suffer than those who trusted to the credit which the bailee had created. 2 B.R. 70. 1 Ves. 504. 870.  
2 Esp. 566.

The Stat. relates however, only to the case of bankrupt bailors. With regard to solvent

bailies there is no need of any provision, for if they have goods of their own, justice does not require that a bailor's property should be liable. 2 J.R. 67.

It extends to all cases where goods of one person are in any manner in the possession, order or disposition of a bailie, with the owner's consent. So it extends to goods which did not belong to him originally, as well as to those which did. Corp. 252. 1 B. & P. 32. Eds. 569.

It is well to observe that as to goods originally belonging to a bailie & by him sold, but permitted by a purchaser to remain in his possession, the rule was as strong before as it is now. Such a conveyance has been held fraudulent, & consequently void by 3 H. 13 Elr. 3 Co. 81. Corp. 253. 2 J.R. 587. 95. 97. 71.

And also a creditor of a bailie is allowed to come on the goods in his possession not strictly on the ground of fraud between bailor & bailie, but on the ground of false credit. 1 H. 562. 574. Eds. 588.

And further, by rebutting a presumption of fraud between bailor & bailie will avail him nothing to a bailie, as between him & a creditor. 1 H. 563. 1 J.R. 188. 5.

The question is whether there has been a false credit raised by a bailor on his conduct, if there has been he is liable.



But *q. stat.* does not extend to goods, but  
 as if a bankrupt in *q. right* of another  
 as if an exec. shd. become a bankrupt, be-  
 ing in possession of *q. property* by deceased,  
 that *propy.* is not liable. It is not *q. fault*  
 if *q. representative* yet he holds them, for he  
 holds *q. goods* by law. They can't be re-  
 vented. 1 *Wils.* 282. 220. 1 *Atk.* 158. 1 *Wils.* 717.  
 2 *Atk.* 618. 220. 70. 1 *Atk.* 105. 1 *Wils.* 260.

Exp. 566.

25. The *stat.* extends however as well to mortgaged goods  
 as to absolute sales, where *q. vendor* remains in  
 possession. And it may be asked why  
 are not mortgaged lands *statutoria*?

The reason is, that *q. law* does not make *q. possession*  
 of lands to be proof of ownership, & *q. ownership*  
 of lands can always be proved by title deeds.

But there can be no such proof of *q. owner-  
 ship* of personal property. Possession of *q. pers.  
 property*, especially with *q. order* & disposition of  
 it is *q. best evide.* of title. 1 *Atk.* 105. 1 *Wils.* 398.  
 1 *Wils.* 260. 1 *Wils.* 189. 90. 1 *Wils.* 258. 57.

The *stat.* does not extend to *q. sale* of a ship  
 at sea by an owner on land, where immediate  
 possession can't be given to *q. vendee* & ergo  
 it is not *q. fault* of either party, yet *q. vendor*  
 remains in *q. possession* of *q. vendee*. 1 *Wils.* 101.

1 *Wils.* 338. 51. 2 *Wils.* 402. 85. 91. 1 *Wils.* 362. 6. Exp. 566.

But in this case *q. vendee* of *q. ship* must take  
 possession of her on her return as soon as may be.  
 Hence the *q. vendee* become a bankrupt, &  
 ship not be liable to be taken by *q. creditors*.

1 *Wils.* 352. 2 *Wils.* 485. 152. 51. Exp. 567. 8.

Post 107.

To bring a case within a Stat. & goods must 98.  
be possessed in a bankrupt's hands & same as  
his own goods are of this with consent of the  
court. (Part 10.)

They must not only be left in his possession but  
also in his order & disposition. Hence before  
it is not sufft.

If J. let B. a horse to go a journey, & B.  
is a bankrupt, & horse is not liable on J. bank-  
rupt's debts. i.e. & horse can't be taken  
for his debts. There is not sufft. evd.  
of ownership according to com. experience, as  
it is very common for men to use other than  
their own horses. It wd. be otherwise if he  
kept & horse for one or two years. Coop. 283.

1 Atk. 85. 3 Tr. 310. 10p. 567.70. 7 Tr. 252.

For & same reason a temporary retention  
on a particular & necessary purpose to be  
answered for & bailor will not make & good  
liable. if & bailor becomes a bankrupt  
such a case is not within either of & Stat.  
for to bring a case within either, & bankrupt  
bailor must appear to be in all respects  
& true owner.

1 Phil. 184. 200. 1 Atk. 183.  
10p. 567.70.

If from & nature of his business & presump-  
tion of his ownership is excluded, & true owner  
shall hold & goods in preference to & cred-  
itor. Thus if a factor known to be such  
becomes bankrupt & goods to this principle are  
not liable for his debts, he being known to  
be a factor. In appen. of & goods gives  
no false credit to him. 1 B. & P. 32.

3 D. 115. 3 D. 135. 10p. 570. See & Goldsmith's (i.e.)  
Private Bankers in Eng.



These two stat. are intended for benefit of  
bailor's creditors & purchasers have no concern.

The Stat. 27<sup>th</sup> Eliz. has made provision  
for them, but as it is in affirmance of C.L.  
it is needless to treat of it.

97. In com. cases of bailment not coming within  
in either stat. & genl. rule is that true owner  
(bailor) may recover vs. & purchaser of & bailee  
as a subject. Bailee or a purchaser who  
takes & goods as being & bailee's, except  
in a single case of a sale in a market  
overt by & bailee, for to all these (except  
these) persons " caveat emptor " applies.

1 Wils. 8. Hoar vs. Hartop a leading case.

1187, 3 exch. 44. Stark. 233. Exp. 579.

5 Bacc. 260.6. 2 R.R. 276. 4 ex. 554. n 55.

The rule is the same as to & bailor as if & goods  
had been taken from him wrongfully.

But there is an exception to & rule where  
property, value of money or Bank bills or  
any circulating medium transferable by  
delivery. Here a bona fide transfer from  
& bailor & a bona fide receiver will hold vs.  
& owner.

It is & rule tho & money be taken  
wrongfully & can be identified. This rule is  
founded in commercial policy. Stark. 126.

1 Bover. 452. 8. 3 Ex. 1510. 1 R.R. 485. Exp. 27, 580

" Ex. 62. Wilson vs. Grace.

Under & Stat. a creditor of & bailee who seizes  
property, as he can't hold vs. & bailor in any  
case in & bailor is a bankrupt.

So it is in Court, how strong security ap-  
pearance of ownership may have been, for if  
the bailee is solvent & creditor may have his  
remedy.

It's also of a purchaser, for he has his  
remedy vs. the bailee, on his implied warranty  
of title.

It has been observed that if the bailee is  
insolvent, his creditors will not hold him  
for the bailee's property, such as gave him  
a false credit. And it may be added  
that the property must also be in his order &  
disposition. And tho' the bailee is insol-  
vent, with all the appearances of ownership  
the creditors can't hold vs. the bailee in the  
terms of the bailment, enabled the bailee to  
hold & appear as the true owner.

This was settled in the following case.

A. deposited as a pledge with a pawn-  
broker a sealed bag of jewels & he being  
insolvent disposed of them to 3 persons.

The pawn-broker had no right by the words 98.  
of the bailment, to treat these goods as his own.

The breaking of the seals was clearly  
a violation of his trust. 194th. 185. 3 Do. 44.

1 B. & P. 82. 8. 648. Doug. 306. 1 T. R. 67.

237. 1 T. R. 243. Cook; Bank L. 234. 243. 2206. F. C. 556.

This case will illustrate the rule that the bail-  
ment must not only have the appearance of  
ownership, but that he must, with the con-  
sent of the owner, have the order & disposition.

If then goods are left with a depositary, &  
he becomes insolvent & sells them, the purcha-  
ser can't hold them, nor can the creditors of the



bailor hold vs. 3 bailor. 3 Jtk. 44. Doug. 505.

24th. 185 2d. 567.

It is also if left by a purchaser in temporary possession of 3 vendor, for a particular, reasonable, & necessary purpose & 3 vendor becomes insolvent, neither creditors nor purchaser can hold vs. 3 owner.

Brown vs. Gunderson Cont.

It has also been determined in Cont. that when one person lets a cow to another if 3 bailor becomes insolvent 3 creditors or purchasers can't hold vs. 3 bailor; for it being a very customary thing, 3 possession is not sufficient proof of ownership, & 3 rule of law supports this, for such this species of bailment. It is discouraged & it is a very useful one.

102.

A purchaser of beef-cattle for 3 State of N.Y. committed them to a certain driver to drive them to N.Y. & 3 driver brought them to his own town & sold them. It was held that 3 purchaser do not hold them, for 3 mere fact of driving them is very slight, or no proof at all, of ownership.

It seems to be a question not precisely settled in 3 books whether if goods are bailed for hire to be used by 3 bailor for a certain time 3 creditors upon his becoming insolvent can take 3 use to them for 3 term of 3 bailment.

The better opinion seems to be that a purchaser can't hold, & that it can't be taken in 3. 39. 44. ex. The principle on which this is founded, is that it is a personal trust in 3 bailor, & he

can't himself assign it during 3 terms. The genl. principles relating to assignment of a pawn apparently equally well here. 5 T.R. 604. 3 East 6.

19 Mod. 210. 6 D. 223. 2. (7 T.R. 11. 12. says he can but this is not 3 better opinion.)

Upon reading 3 case in 5 T.R. it wd. appear yet 3 opinion of La Kenyon was in favour of admitting such a bailment to be taken, but when considered with regard to 3 subject matter, his opinion wd. seem to be otherwise.

64. 11 Mod. 2. La. Ke. 195.  
97 J. 15. 16.

### Remedy vs. each other is vs. Stingers.

It is a genl. rule, yet 3 bailor having a genl. property may maintain "trespass; trover" or any proper action vs. any person who takes away or injures 3 goods in 3 possession of 3 bailor.

5 Mac. 164. 260. 1 Roll 4. Satch 214. 3 Burr E.L. 292.  
2 Bulst. 268. "Trover" 55.

And 3 rule will hold even tho 3 bailor never 100. had 3 actual possession. provided he has constructive possession, (i.e.) 3 right of present possession. The phrases "constructive possession" & "possession in law" are synonymous, & mean 3 right of present possession.

Thus if 34. makes a bill of sale signed to B. & B. leaves them in 3 possession to A. & a stranger takes them away. B. may recover them from 3 stranger in 3 bill of sale gives him 3 right of 3 constructive possession. 2 Roll. 509. 9 Mod. 438.

It is a rule of law yet he who has 3 interest in things personal. has of course 3 constructive



possession in it has been transferred in his  
own act or in operation of law, then goods  
may be in his hands or another.

Decide if he has not a right of immediate  
possession. Latoh 214. 2 Roll 509, Chd. 438

But when goods are bailed or hired for hire to be  
used for a certain time in a bailor's or hirer's  
possession and action vs. a wrong-doer for taking or  
injuring them during that time; go to maintain  
power or trespass the bailor must have the actual  
or constructive possession at the time when the injury  
was done. But none in his hands.

7 J. R. 4. 180. 480. 480. 490. 8, 10, 11, 12.  
8 J. 2. 333. 335. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

What then is the remedy of the bailor? I answer  
that after the term of bailment is expired he  
may bring his action vs. a wrong-doer but it  
must be for the subject. detention. If he could  
sue for it during the term, he must, he  
must have had a right of possession, & he  
must also have a right of reversion,  
during the term. And Ed. is inconsistent with  
the right of the bailor.

During the time the bailor has the right of action,  
but for the detainer after the term the  
bailor has the right of action.

His power is grounded on property. Why may he not  
have an action? Because he has not the property  
at the time being.

But it is said that he may maintain a special  
action on the case for the injury to the invasion.  
1 G.L. 226. 187. 2 Do. 529, n. 1 Ph. 400. 184.  
8 Com. 432. 11 Do. 585. 3 Loo. 209. 339.

If the paper is actually destroyed by the wrong  
doer during the time, the bailor may sue the  
wrong-doer to satisfy the bailor. But if he refuse  
to sue or lend his name to the bailor in order that  
he may sue a G.L. of 4. 11, will compel him  
to lend it.

If goods belong to A. & B. are in the possession of  
A. & B. gives them to B. in parcel with the del.  
ivery, & a stranger takes them away or injures  
them while in A's possession B. can't have an  
action w. a wrong doer. He has neither actual  
nor constructive possession, for a parcel gift  
with delivery does not carry a right to possession.  
11 Loo. 455. 5 Bac. 140. 44. 511.

But a delivery to oneself, or to any  
one appointed to receive them by the donor or  
donor in direction is in law a delivery to him-  
self. Co. 294. 6. 85. 14.

If, under a delivery of goods to a stranger  
the bailor will maintain his claim w. a stranger for  
receiving 3 goods, nor in first instance though, but  
upon demand by a bailor, with proof of ownership &  
refusal, a bailor may have trover w. him.

5 Bac. 14. 201. 1 Do. 241. 257. 11 Loo. 407.  
Loo. 857. 11 Loo. 127.



106.  
Bailee's  
right of  
action.

On the other hand, most bailees, & it is seen  
any bailee may maintain an action for the full  
value <sup>of</sup> any <sup>goods</sup> wrong done who takes the goods from  
him or injures them while in his possession.  
As to bailees of all classes except the first, there  
is no doubt in any of the books respecting this  
right. 5 Benc. 165. 252. Bull 33. La. Pl. 276. 4 alk. 143.  
1 Mod. 31. Esp. 577. ("Prover" 58.) Ant. 1.

A finder may recover vs. a stranger who takes  
the goods wrongfully or injures them in his pos-  
session for ex. vs. the true owner, in his  
right of possession. A bailee a Subsidiary owner.  
The. 508. Bull 33. Esp. 577. La. Pl. 276.

The ground of the bailee's right to sue a stranger  
or is sd. to be his own liability over to the owner.  
It was therefore never doubted whether a bailee  
any under a fault, a bailee can ever maintain  
an action vs. a wrong doer, because it is sd.  
that he is liable only for his own ground to the  
owner. 5 Benc. 164. 502. 1 Inst. 90. 1 Sid. 348.  
438. 13 Co. 69. Fitch. 87. ("Prover" 58.) Ant. 1.

107.

This conclusion seems to be mostly reason of  
old. 1<sup>st</sup> Ground of bailee's liability is not  
ground of his right of action & 2<sup>d</sup> Because  
if it was he sd. still have his right of action.  
3<sup>rd</sup> It is seen that on the ground of  
his having a special prop. he may this right.  
It admits of no doubt that he has the special  
prop. He has right of possession vs. all persons  
except the owner. Jones 12. 12th. 572. 8. Benc. 276. 1. 56. 575.  
The. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

It is almost to say that a man has the right of dis-  
position while committing a remedy to those who are  
him in the possession.

It is a well established rule that a father has a  
right to action as a wrong done. If then he is an  
action to the action even in possession with the con-  
sent; a question of the position of the father  
in possession with his consent, that it never was  
contended that the ground of the father's right to  
action was his liability over to the owner.

Sta. 509. 5 Bar. 262. Lomb. 201.

It still stronger case analogous, if a man is  
robbed of his master's goods in his master's ab-  
sence may maintain an action as the master  
on the Stat. of Winton. But it is universally  
agreed that he is not liable to his master.

The ground of his right is merely a broken  
possession in the law. 4 Mod. 461. Lomb. 201.  
Lomb. 203. 2 Mod. 464. Sta. 509. 5 Bar. 262. Lomb.  
201.

It is also a case where a man may maintain  
an action as one who takes away the timber. The  
owner is not liable to his master. But he has  
the right of possession. Lomb. 201.

The manuscript having regard to  
the law of property and more than one thing  
done. It is the position that a man has a right  
to a thing as a liability over to the owner. But  
it is a question of the position of the owner.

5 Bar. 262. Lomb. 201.

The law of property is a subject of some importance. The  
law is a little more to the master than the child. The



It seems then to be equally correct to regard as  
a part of the nation's right of action in domestic  
policy, not the substitute for the nation.

It is in fact a social dog, a dog that  
helps to give a right of action to a wrong man.

روز و شب از آن لذت می برد.

Dear Mr. Jones - I have a letter from Mr. Jones who  
has written to you in regard to the matter of the  
some of the things of which I am a great admirer  
in a very good way. J. H. H. 1891

Even in a contract, with liberty over to the law  
or in every instance, ground of claim is  
being lost. Still assuming I have the right  
to refuse. He may be in the. As I cannot  
over the goods & may be subjected to loss  
and. The other must be the same as the rep-  
resentation is entitled to the action. If not  
known whether he is liable or not, before  
action is brought, but in such a case  
it is very rare.

his rule says it is in accordance with our constitution  
and is intended to secure the best of both worlds  
and to preserve the peace.

[illegible]

the reason is not that we have an interest in  
from his conviction but because it is in his  
own name. H. B. S. No. 2412. Sub. p. 2nd, 3d.

It is the master of a ship, my maintenance  
 is his own name for the benefit, and  
 cost is in his own name. S. 103. S. 104.  
 Bull 130.

It will be perceived from the above that in many cases an entire new system of management is required for the successful culture of the mulberry or silkworm. But there can be no doubt that for the purpose of raising the quality of the silk the silkworm must be reared in a clean and healthy environment. The silkworm must be reared in a clean and healthy environment. The silkworm must be reared in a clean and healthy environment.



It is not, however, in these cases, that the mother's milk  
is the only one which is necessary for the child's health.  
There is a great deal of milk, and a great deal of milk,  
which is not the mother's milk, and which is not the mother's milk.

2. 20. 6. 19. 20. 21.

[illegible]

2 Nov. 79. Label 29. "Nov. 39. "New York State" 31.

[illegible]

783. By a letter sent by the author of a communication to our  
correspondent in London, he writes that he is entitled  
to receive subscription, &c. May 7. 1840. p. 6. 58.

[illegible]

and the same is the case with the other  
and the same is the case with the other

section is, under, for he is entitled; the next two  
conceded that we shall see under his election & is  
account for it. Then if we see no direct author-  
ity to this extent also there is the same result.  
cases to support it.

9<sup>th</sup> m. , was in a canoe of escape ; put in  
the process in the canoe. The 1<sup>st</sup> of 1850 was  
discharged. 1850. 11. 12. 1850. 1850. 1850. 1850.

1. The first of these is the fact that the
 most important part of the work is the
 most difficult.

There are no contributions to sub. 114.  
This sub. is correct in principle but it is  
true that the numbers concerning an entire set  
of numbers exist. There are no more or less  
than 4 to each and number.

As the cable states, 300,000 francs would be  
 more or less spent in the case of a rebellion.  
 We have now maintained a special action on the  
 case 100,000 francs in such case of a rebellion a  
 more over. The cable may receive for special  
 action. 100,000 francs. 100,000 francs. 100,000 francs. 100,000 francs.

What a fine collection of birds and other mammals  
from other sources. I have a very high  
est. of you. The collection is very good  
and the specimens are well preserved. The birds  
are all in good condition. The mammals are  
also in good condition. The collection is  
very fine and I am sure it will be  
a great help to the study of the  
birds and mammals of the region.



On that point, however, it is generally true that a  
 right is not lost by transfer, or by assignment, or by  
 one. But it is true in some cases, and in  
 many instances there is a change in the nature  
 of the right, and some rights appearing in the  
 form shall be in violation of damages.  
 2 Co. 69.

In all cases where damages are made, not  
 paid, or not paid, since there is a right to  
 recover, the value of the right is the same. But if  
 there is a right to recover, the value of the right is the same.  
 In some cases a right to the whole value.

Under the value of the right,  
 the value of damages whatever in the case,  
 and it is seen that the value of the right is the same.  
 In some cases, the value of the right is the same.  
 In some cases, the value of the right is the same.

If the damages sustained by the party are  
 greater than the value of the property, the  
 value of the property is the same.

The damages sustained may be more  
 than the value of the property, but  
 the value of the property is the same.  
 The value of the property is the same.  
 The value of the property is the same.

117.

If the value of the property is the same,  
 the value of the property is the same.  
 The value of the property is the same.  
 The value of the property is the same.

1149 - The first of a series of letters, my mother  
wrote to me, dated 1901, and the first of a series  
of letters to me, dated 1901. The letters are  
from the first of a series of letters to me, dated 1901.

From you, implied, promise to return  
a different sort according to the nature of case.

Full 12. Dec. 25, 8. 10. 5. 27. 10. 6. 18.

Then I built up myself by neglecting the  
 matter. I gave more time to other in 1880-81 & 82  
 on; could not keep up in this, so I took  
 the neglect. I don't 02. 1880, 81, 82, 83, 84, 85.

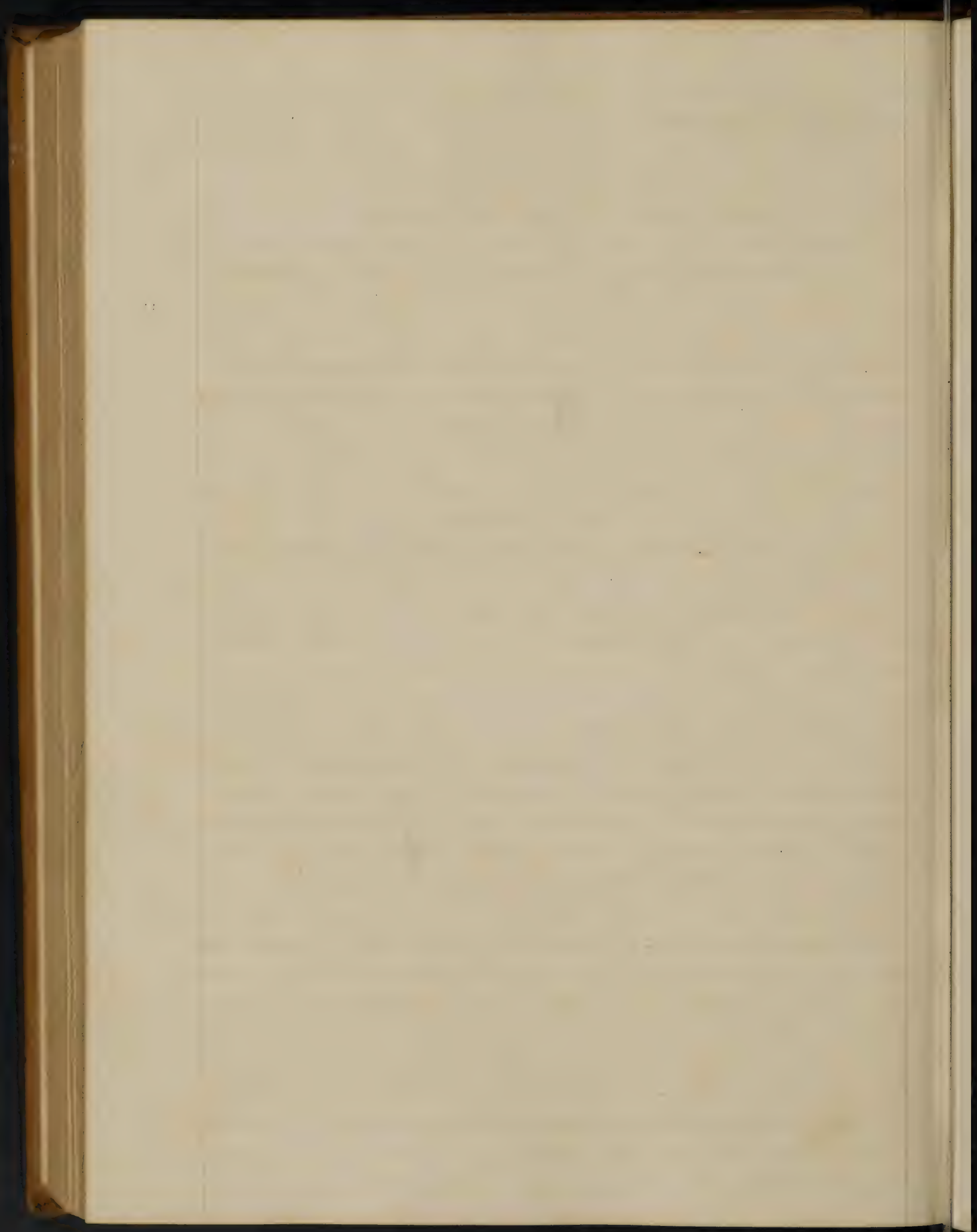
The gent. will then be, that the papers will  
not be so, as to be in favour of, either in  
cause his description of himself & in the same  
going to be no material thing. & the same will  
see. 1/8.

There is an exception; rule above; and  
which is not the case; for the first exam-  
ination in the last part of the book is a  
test of the student's knowledge of the  
248. 250. 252. 254. 256. 258. 260. 262. 264. 266. 268. 270. 272. 274. 276. 278. 280. 282. 284. 286. 288. 290. 292. 294. 296. 298. 300. 302. 304. 306. 308. 310. 312. 314. 316. 318. 320. 322. 324. 326. 328. 330. 332. 334. 336. 338. 340. 342. 344. 346. 348. 350. 352. 354. 356. 358. 360. 362. 364. 366. 368. 370. 372. 374. 376. 378. 380. 382. 384. 386. 388. 390. 392. 394. 396. 398. 400. 402. 404. 406. 408. 410. 412. 414. 416. 418. 420. 422. 424. 426. 428. 430. 432. 434. 436. 438. 440. 442. 444. 446. 448. 450. 452. 454. 456. 458. 460. 462. 464. 466. 468. 470. 472. 474. 476. 478. 480. 482. 484. 486. 488. 490. 492. 494. 496. 498. 500. 502. 504. 506. 508. 510. 512. 514. 516. 518. 520. 522. 524. 526. 528. 530. 532. 534. 536. 538. 540. 542. 544. 546. 548. 550. 552. 554. 556. 558. 560. 562. 564. 566. 568. 570. 572. 574. 576. 578. 580. 582. 584. 586. 588. 590. 592. 594. 596. 598. 600. 602. 604. 606. 608. 610. 612. 614. 616. 618. 620. 622. 624. 626. 628. 630. 632. 634. 636. 638. 640. 642. 644. 646. 648. 650. 652. 654. 656. 658. 660. 662. 664. 666. 668. 670. 672. 674. 676. 678. 680. 682. 684. 686. 688. 690. 692. 694. 696. 698. 700. 702. 704. 706. 708. 710. 712. 714. 716. 718. 720. 722. 724. 726. 728. 730. 732. 734. 736. 738. 740. 742. 744. 746. 748. 750. 752. 754. 756. 758. 760. 762. 764. 766. 768. 770. 772. 774. 776. 778. 780. 782. 784. 786. 788. 790. 792. 794. 796. 798. 800. 802. 804. 806. 808. 810. 812. 814. 816. 818. 820. 822. 824. 826. 828. 830. 832. 834. 836. 838. 840. 842. 844. 846. 848. 850. 852. 854. 856. 858. 860. 862. 864. 866. 868. 870. 872. 874. 876. 878. 880. 882. 884. 886. 888. 890. 892. 894. 896. 898. 900. 902. 904. 906. 908. 910. 912. 914. 916. 918. 920. 922. 924. 926. 928. 930. 932. 934. 936. 938. 940. 942. 944. 946. 948. 950. 952. 954. 956. 958. 960. 962. 964. 966. 968. 970. 972. 974. 976. 978. 980. 982. 984. 986. 988. 990. 992. 994. 996. 998. 1000. 1002. 1004. 1006. 1008. 1010. 1012. 1014. 1016. 1018. 1020. 1022. 1024. 1026. 1028. 1030. 1032. 1034. 1036. 1038. 1040. 1042. 1044. 1046. 1048. 1050. 1052. 1054. 1056. 1058. 1060. 1062. 1064. 1066. 1068. 1070. 1072. 1074. 1076. 1078. 1080. 1082. 1084. 1086. 1088. 1090. 1092. 1094. 1096. 1098. 1100. 1102. 1104. 1106. 1108. 1110. 1112. 1114. 1116. 1118. 1120. 1122. 1124. 1126. 1128. 1130. 1132. 1134. 1136. 1138. 1140. 1142. 1144. 1146. 1148. 1150. 1152. 1154. 1156. 1158. 1160. 1162. 1164. 1166. 1168. 1170. 1172. 1174. 1176. 1178. 1180. 1182. 1184. 1186. 1188. 1190. 1192. 1194. 1196. 1198. 1200. 1202. 1204. 1206. 1208. 1210. 1212. 1214. 1216. 1218. 1220. 1222. 1224. 1226. 1228. 1230. 1232. 1234. 1236. 1238. 1240. 1242. 1244. 1246. 1248. 1250. 1252. 1254. 1256. 1258. 1260. 1262. 1264. 1266. 1268. 1270. 1272. 1274. 1276. 1278. 1280. 1282. 1284. 1286. 1288. 1290. 1292. 1294. 1296. 1298. 1300. 1302. 1304. 1306. 1308. 1310. 1312. 1314. 1316. 1318. 1320. 1322. 1324. 1326. 1328. 1330. 1332. 1334. 1336. 1338. 1340. 1342. 1344. 1346. 1348. 1350. 1352. 1354. 1356. 1358. 1360. 1362. 1364. 1366. 1368. 1370. 1372. 1374. 1376. 1378. 1380. 1382. 1384. 1386. 1388. 1390. 1392. 1394. 1396. 1398. 1400. 1402. 1404. 1406. 1408. 1410. 1412. 1414. 1416. 1418. 1420. 1422. 1424. 1426. 1428. 1430. 1432. 1434. 1436. 1438. 1440. 1442. 1444. 1446. 1448. 1450. 1452. 1454. 1456. 1458. 1460. 1462. 1464. 1466. 1468. 1470. 1472. 1474. 1476. 1478. 1480. 1482. 1484. 1486. 1488. 1490. 1492. 1494. 1496. 1498. 1500. 1502. 1504. 1506. 1508. 1510. 1512. 1514. 1516. 1518. 1520. 1522. 1524. 1526. 1528. 1530. 1532. 1534. 1536. 1538. 1540. 1542. 1544. 1546. 1548. 1550. 1552. 1554. 1556. 1558. 1560. 1562. 1564. 1566. 1568. 1570. 1572. 1574. 1576. 1578. 1580. 1582. 1584. 1586. 1588. 1590. 1592. 1594. 1596. 1598. 1600. 1602. 1604. 1606. 1608. 1610. 1612. 1614. 1616. 1618. 1620. 1622. 1624. 1626. 1628. 1630. 1632. 1634. 1636. 1638. 1640. 1642. 1644. 1646. 1648. 1650. 1652. 1654. 1656. 1658. 1660. 1662. 1664. 1666. 1668. 1670. 1672. 1674. 1676. 1678. 1680. 1682. 1684. 1686. 1688. 1690. 1692. 1694. 1696. 1698. 1700. 1702. 1704. 1706. 1708. 1710. 1712. 1714. 1716. 1718. 1720. 1

The restriction of the action to the space  $\mathcal{S}$  on which the restriction of the action is defined, is not an accident or necessity, but is a result of the definition of the action.

Miss, "33rd Street"  
London.





## Stuns & Stinkkeepers.

178 C. L. any person might establish  
an Inn unless they were so numerous that by  
establishing another, it wd. make a public  
nuisance of them. 10<sup>th</sup> license if necessary.  
at C. L. 3. Bac. 1789. 1 Roll 54. Cas. J. 594.  
Palmer. 374.

179<sup>th</sup> In ascertaining the character of a person  
whether he is so, he becomes liable on the Statute  
1789. 4 Bl. 408. Cro. Co. 549. or 43. 2 Hale 174.

4 4<sup>th</sup> orderly Inn may become a public  
nuisance, & the keeper of it may be indicted  
on it. 4 Bl. 408. 3 Bac. 178. 1 Hawk. 178. 125.

But in 1789, & 1790. no man can become an  
Inn-keeper without license. This is now the rule  
in 1790 & in all the following statutes.

The establishment of an Inn without a license  
is now an indictable offence, & for evidence  
as to the man receiving Inn the license  
may be taken away or suspended for a time  
in Court.

## Duties of an Inn-keeper.

The duties of an Inn-keeper in general extend  
no further than to the entertaining of travellers  
& to the keeping of his goods & horses &c. 10. 9. 10. 87.  
3 Bac. 181. 8. 1789. But an Inn-keeper is not bound  
to protect the person of his guest from dally &c.



25. If an innkeeper refuses to entertain a traveller, or, once entertained, refuses to receive him, he is liable to an indictment, as well as to a civil action. - But he is bound only to entertain travellers. 4 Inst. 168. Fink. 202.

That there are causes which will excuse an innkeeper from entertaining travellers, as sickness of his family, pulling up his house, contagious disease of travellers. 3 Bac. 182. Supra 58.

But if he receive them into his house, his absence, sickness, or even insanity will not excuse him from his liability, as an innkeeper - this strictness is grounded in policy. Bro. & L. 627. 3 Bac. 182.

That an innkeeper is not as such liable; as a liability of an innkeeper is founded on contract. 1 Roll. 2. 3 Bac. 182.

If an innkeeper's house is full, if he is obliged to take a guest, & the guest persistently, he is not liable as an innkeeper for loss or injury of guest's goods, in analogy to a common carrier. 2 Bac. 182. Supra 58. ante 59.

If a host requires his guest to lock his wardrobe, & he refuses to be liable unless he does, & the guest refuses or neglects to do so, & the guest loses his goods, I think that an innkeeper is not as such liable. 2 Bac. 182. Supra 20. ante 75. 182.

It is settled however that merely delivering the  
key to the guest will not exempt the Inn keeper  
from loss of the goods, but he must actually ask  
his guest to leave his goods. 8 Geo. 3d. c. 3. sec. 183.  
5 B. R. 273.

The host is liable tho he is ignorant of the  
kind & value of the goods of his guest. 11 Geo.  
3d. c. 3. sec. 183. 5 B. R. 273.

The Inn keeper is liable to the same extent  
as in case of travellers for the goods of those  
who remain with him for a long time at the  
price given by travellers; - but he is not  
liable for goods of boarders who pay only  
for board. 8 Geo. 3d. c. 3. sec. 183.

He is not chargeable as an Inn keeper for  
any goods in the absence of the owner, for keep-  
ing which he receives no price. He is liable  
even as a boarder. 3 B. R. 82. 6 Geo. 3d. c. 3.  
5 B. R. 273. 104 Geo. 3d. c. 3. sec. 179.

But this rule supposes such an absence  
that the owner does not be considered a guest.

But for property in the keeping of which  
he does receive a price the Inn keeper is  
liable as such, tho the owner is no guest.  
13 Geo. 3d. c. 3. sec. 183. 104 Geo. 3d. c. 3. sec. 179.



§ 4 a serv. is obliged to be master's goods at  
any time. The slave keeper is liable over to the  
master. 5 Q. R. 272. Bro. Jac. 274. 12th 182.

§ The slave keeper has the same motions as his  
guests which any other person in such cas-  
e might have, but he has, also a lien on  
the person of his guest untill the whole bill  
is paid. 3 Q. R. 388. 12th 182. 3 Roll 85. He  
can only detain his horse for 3 x 2 days of  
his keeping not for 3 x 2 of his bill.

§ And if the guest shd. leave 7 then witht. 10 x  
supper 8 witht. paying his bill, the slave  
keeper may, however, detain & retain him  
untill paid. 3 Roll. 188. 3 Q. R. 86.

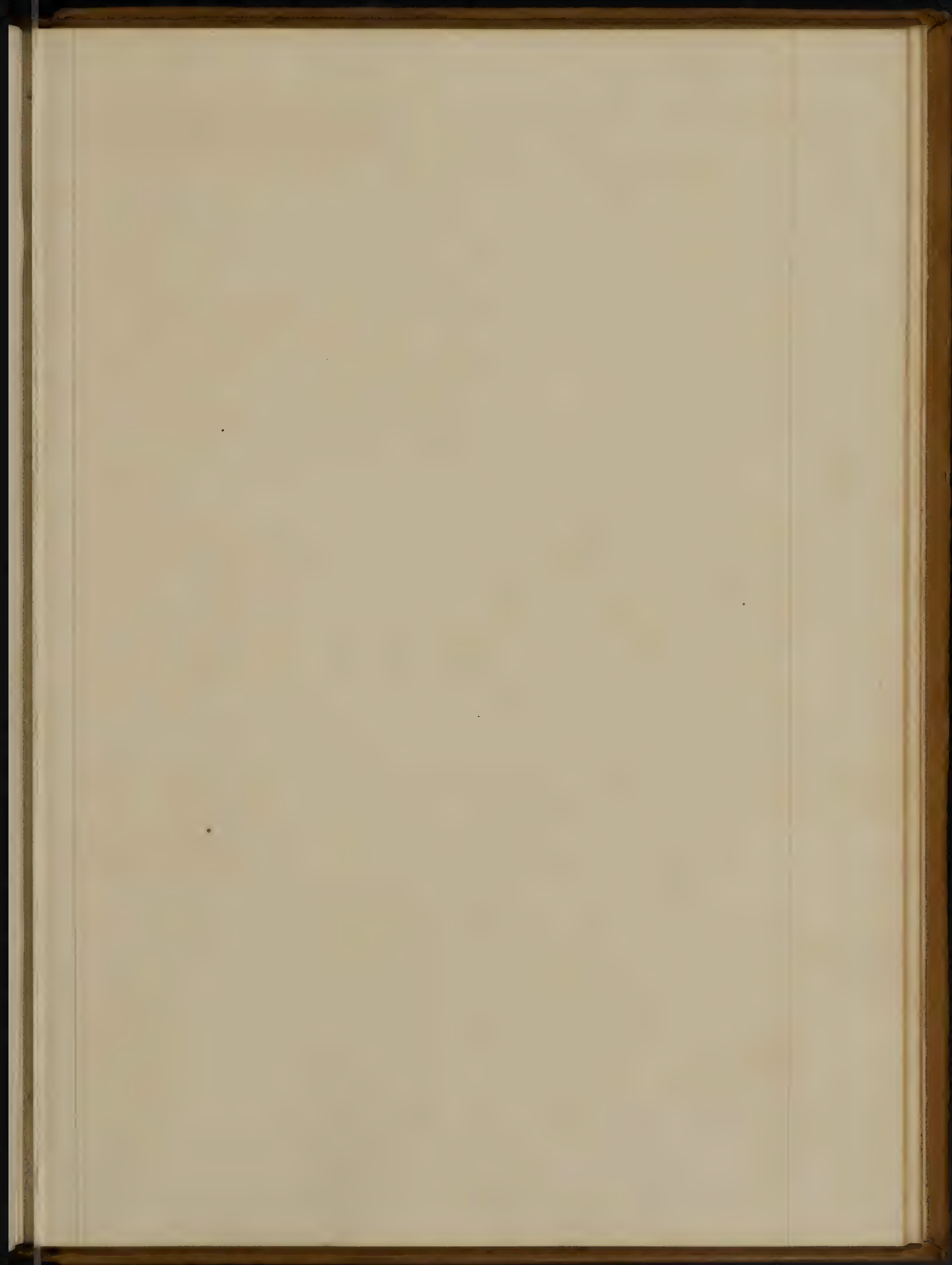
§ But if the guest by permission of  
the landlord leave the house, he can no longer  
detain.

When he retains the horse of his guest, he  
cannot sell him, but he may add the price  
of his keeping, during his detention, to the orig-  
inal bill. Moore 877. 3 Q. R. 355. 3 Q. R. 185.

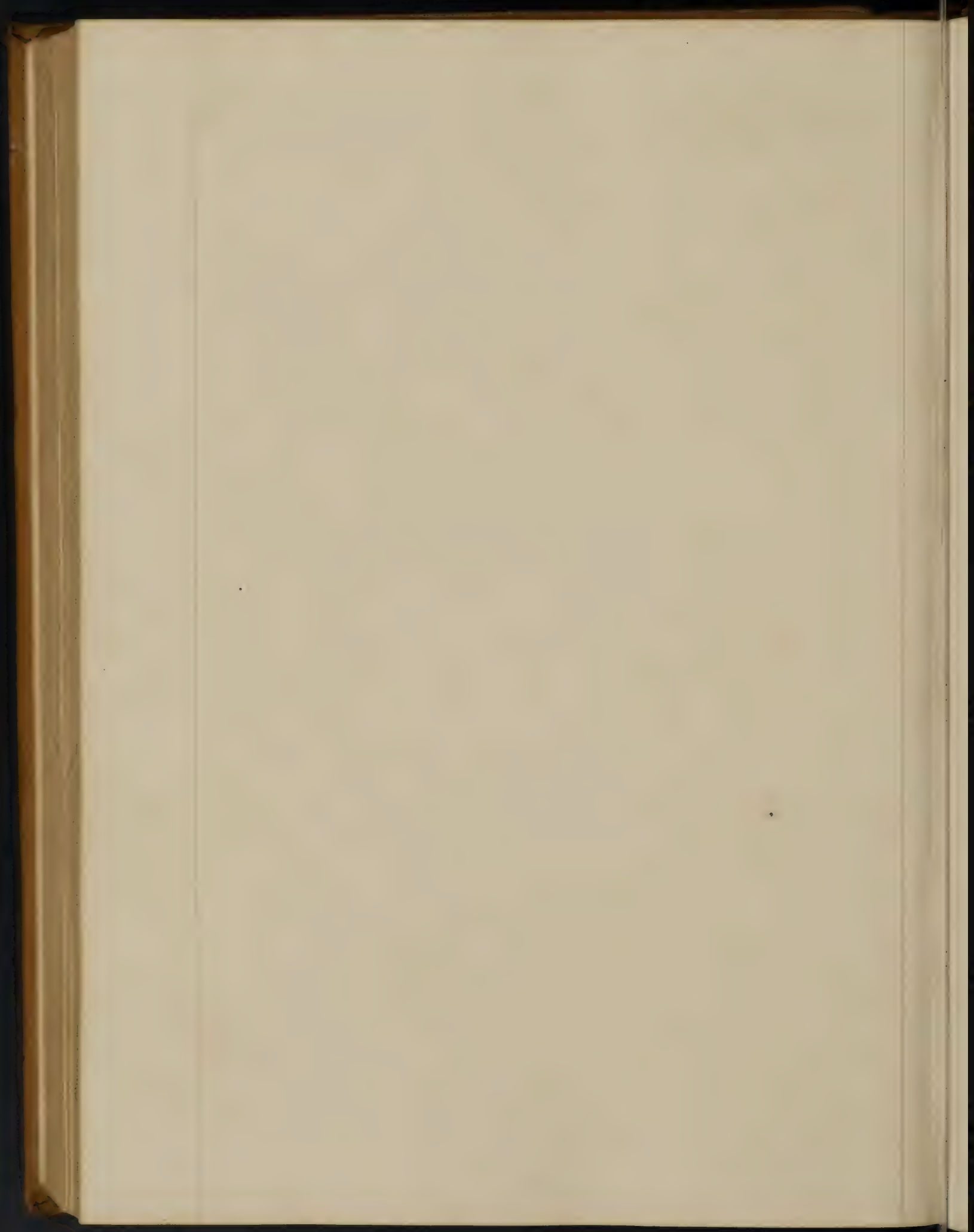
§ A promise by a stranger to pay the bill,  
if the slave keeper will discharge the person  
of his guest, or his horse is finding, & is  
not within 7 days of goods &c. as some have  
supposed. 3 Q. R. 188. 3 Q. R. 305. 12th 182.  
3 Q. R. 185.

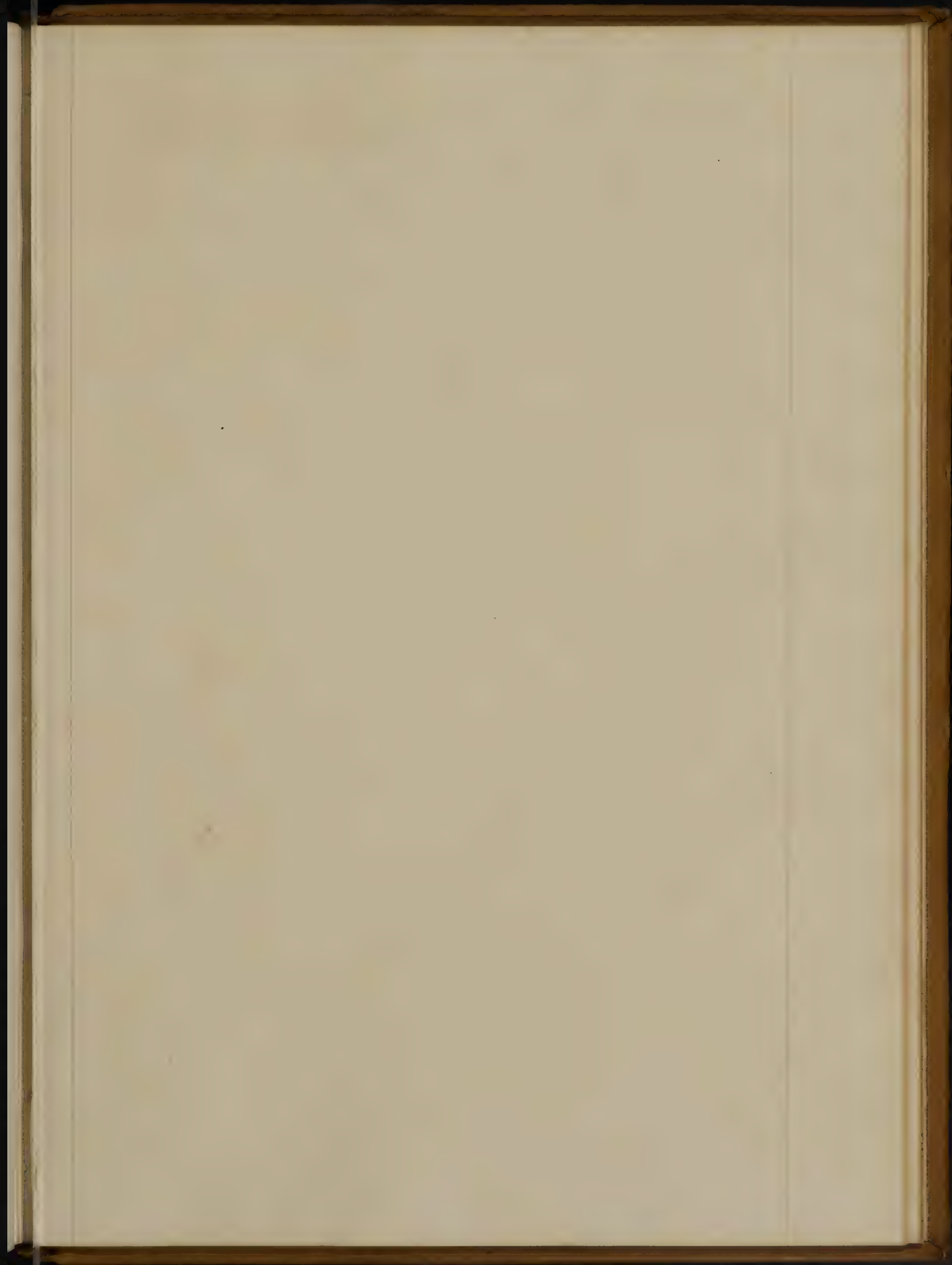
This "Law & Customs"  
Litchfield, Dec.

1826.  
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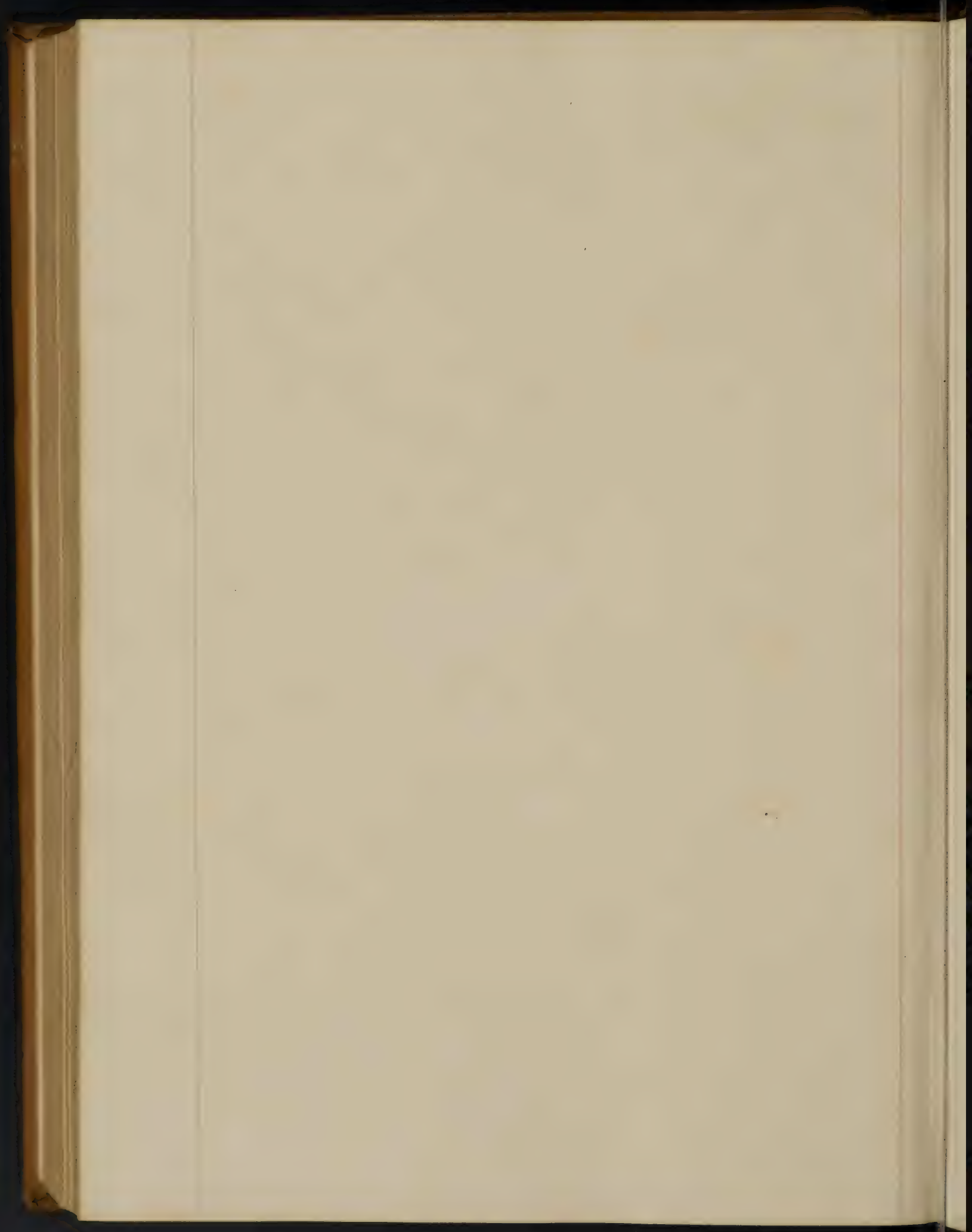


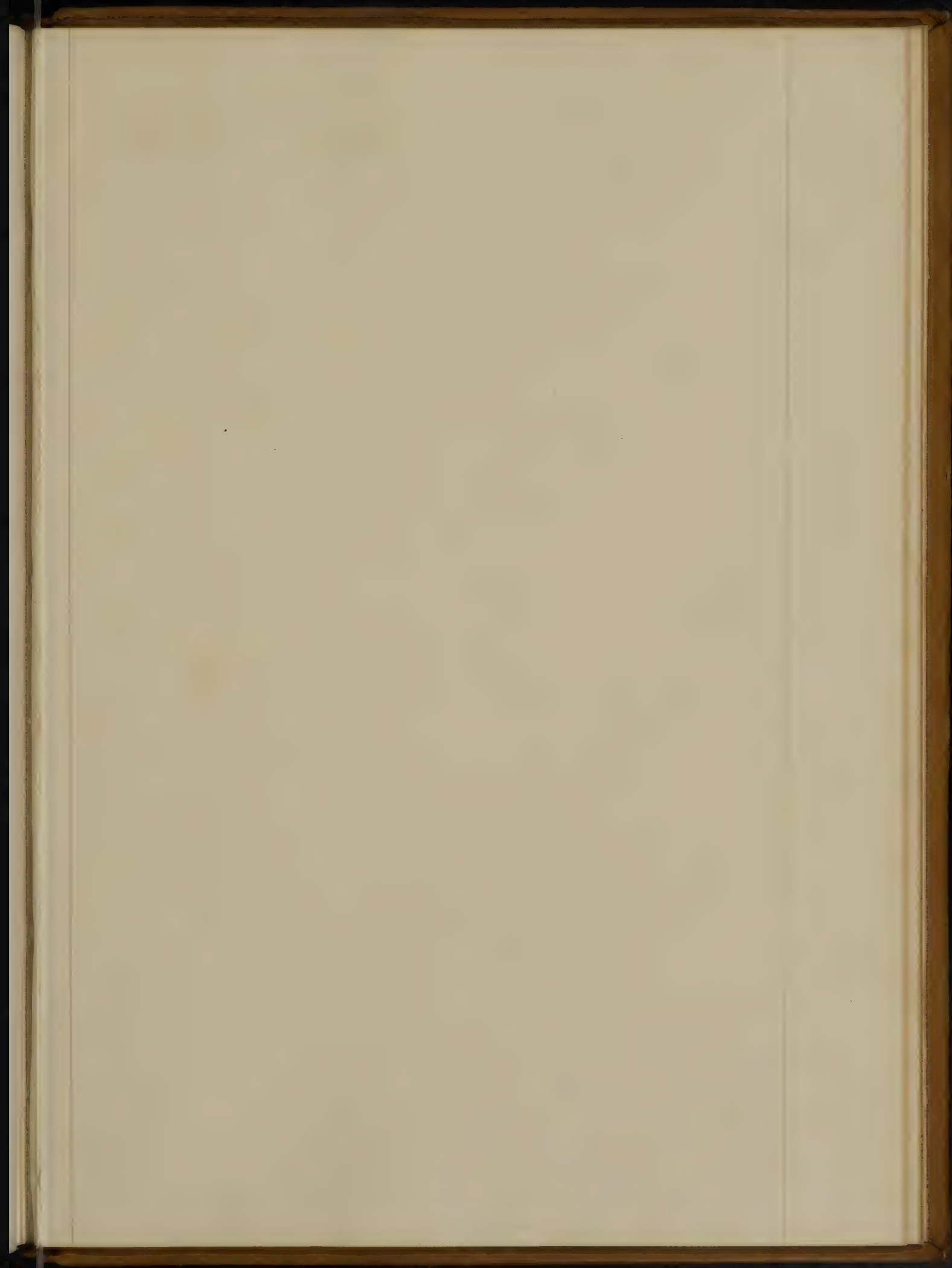




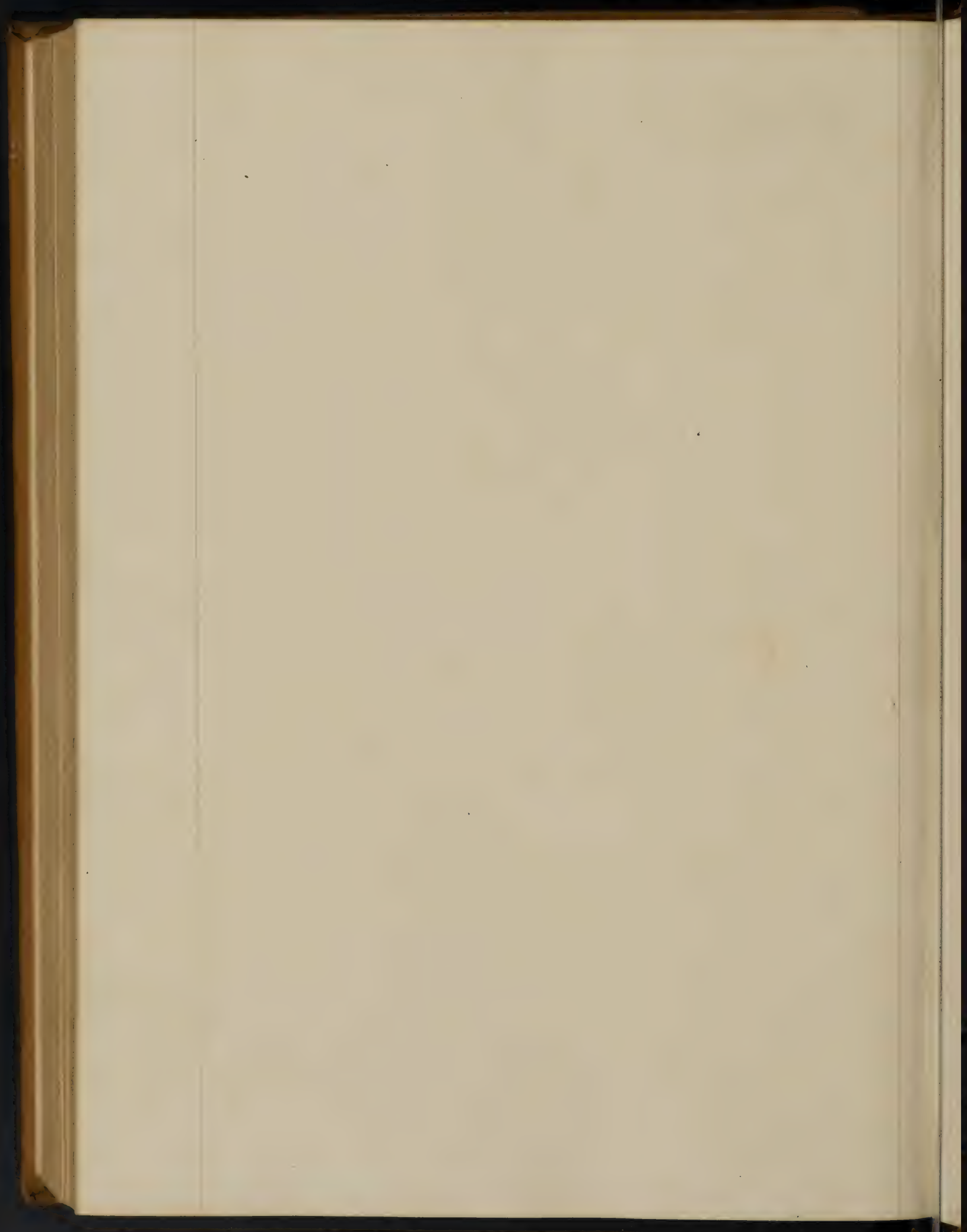


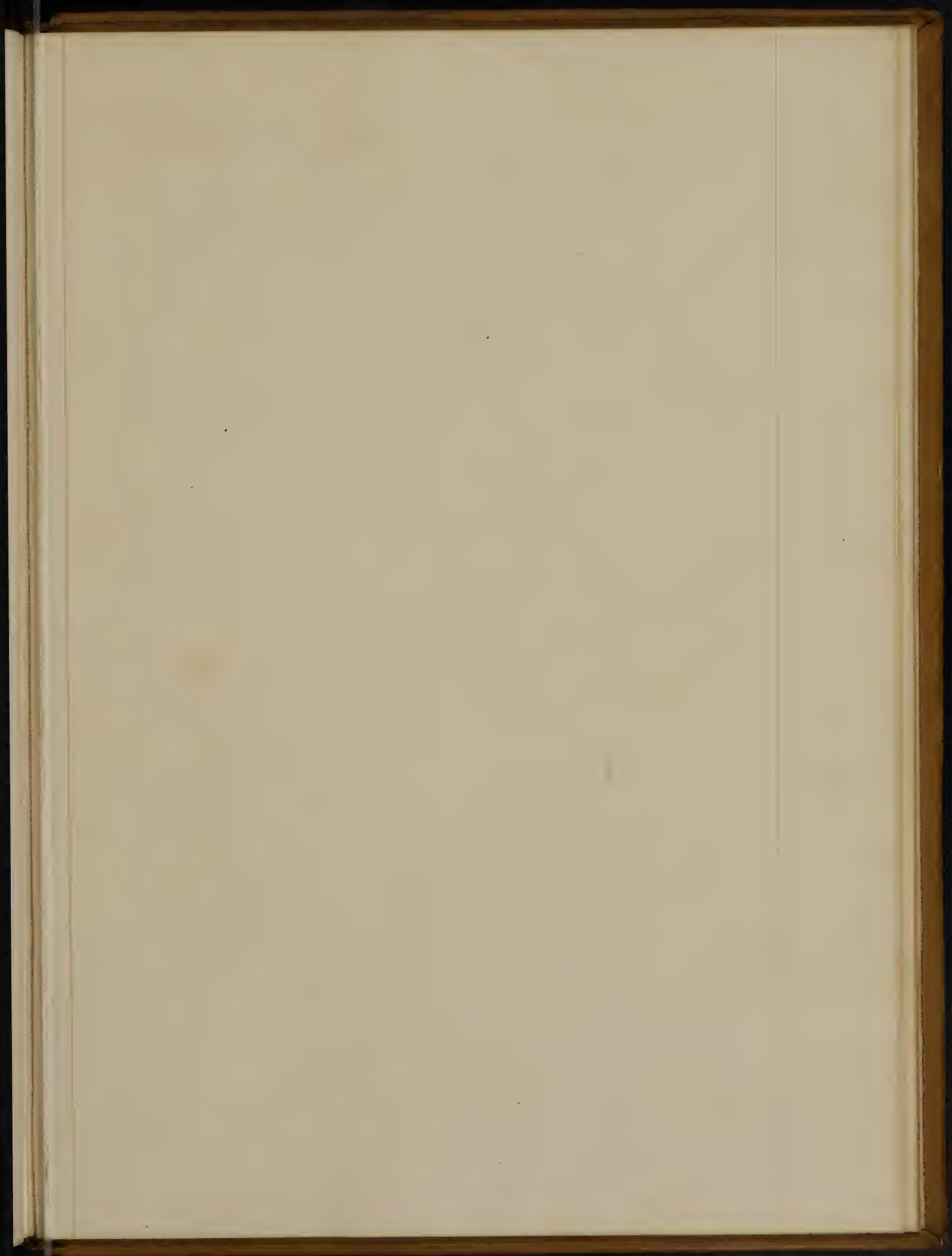




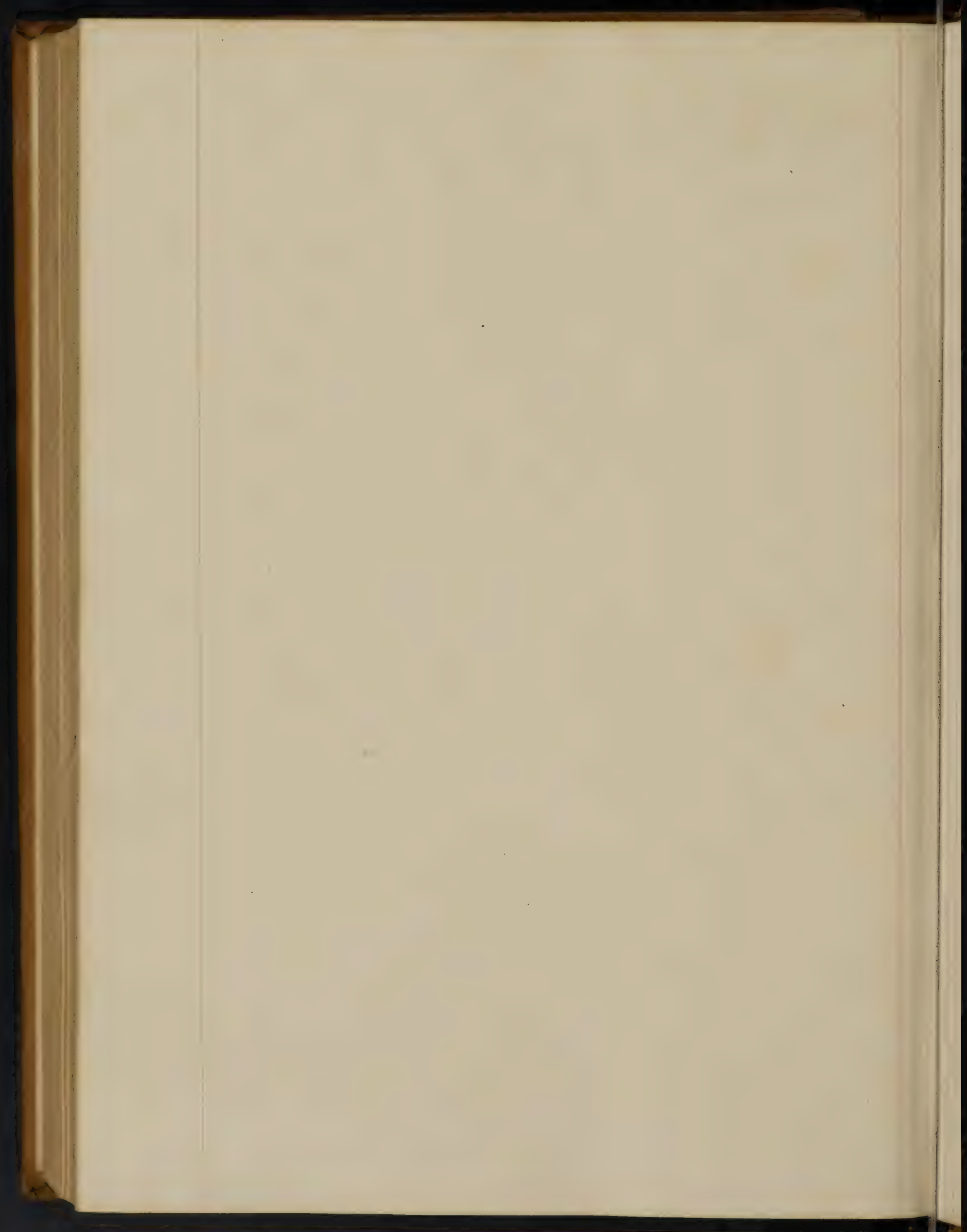


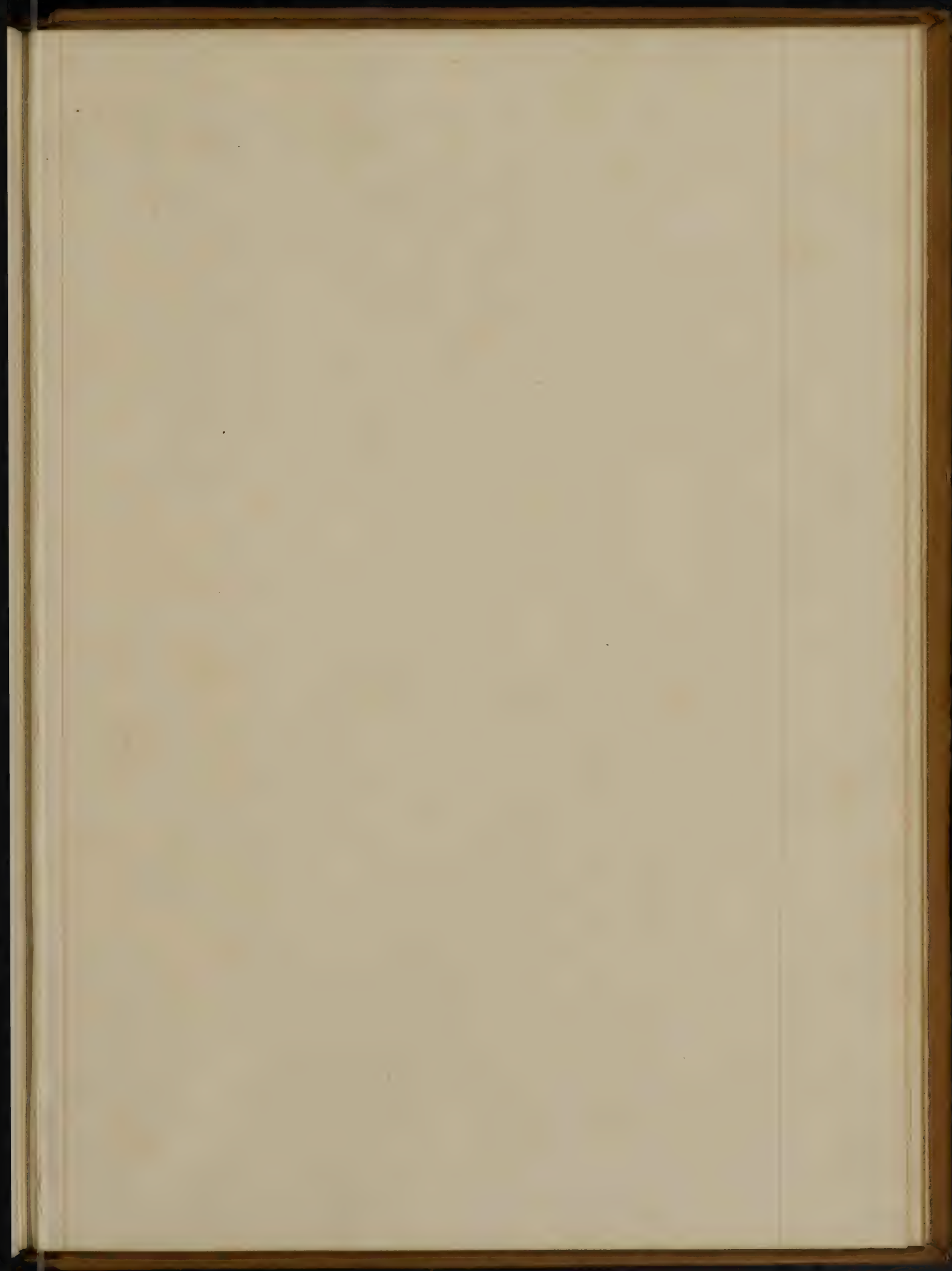




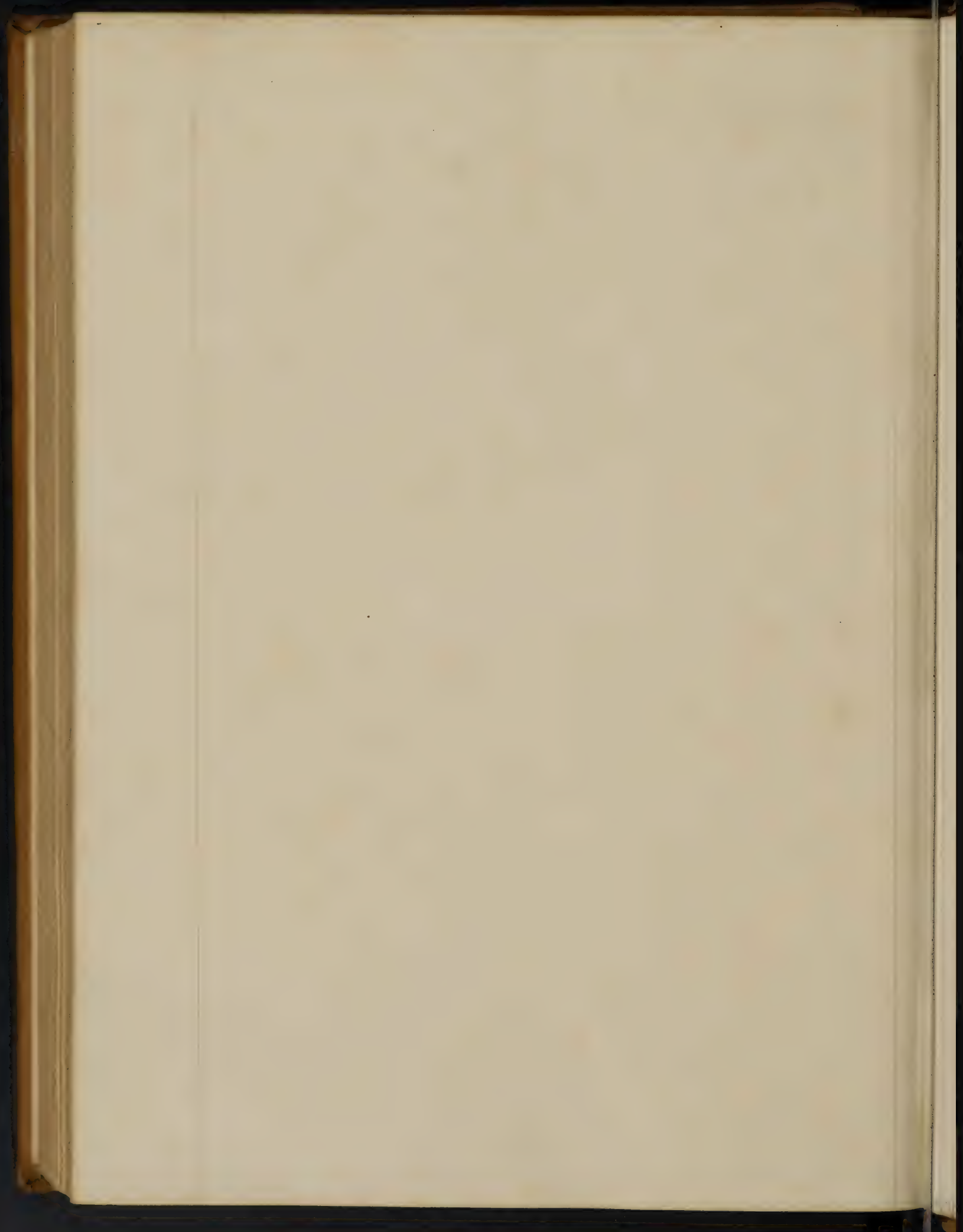


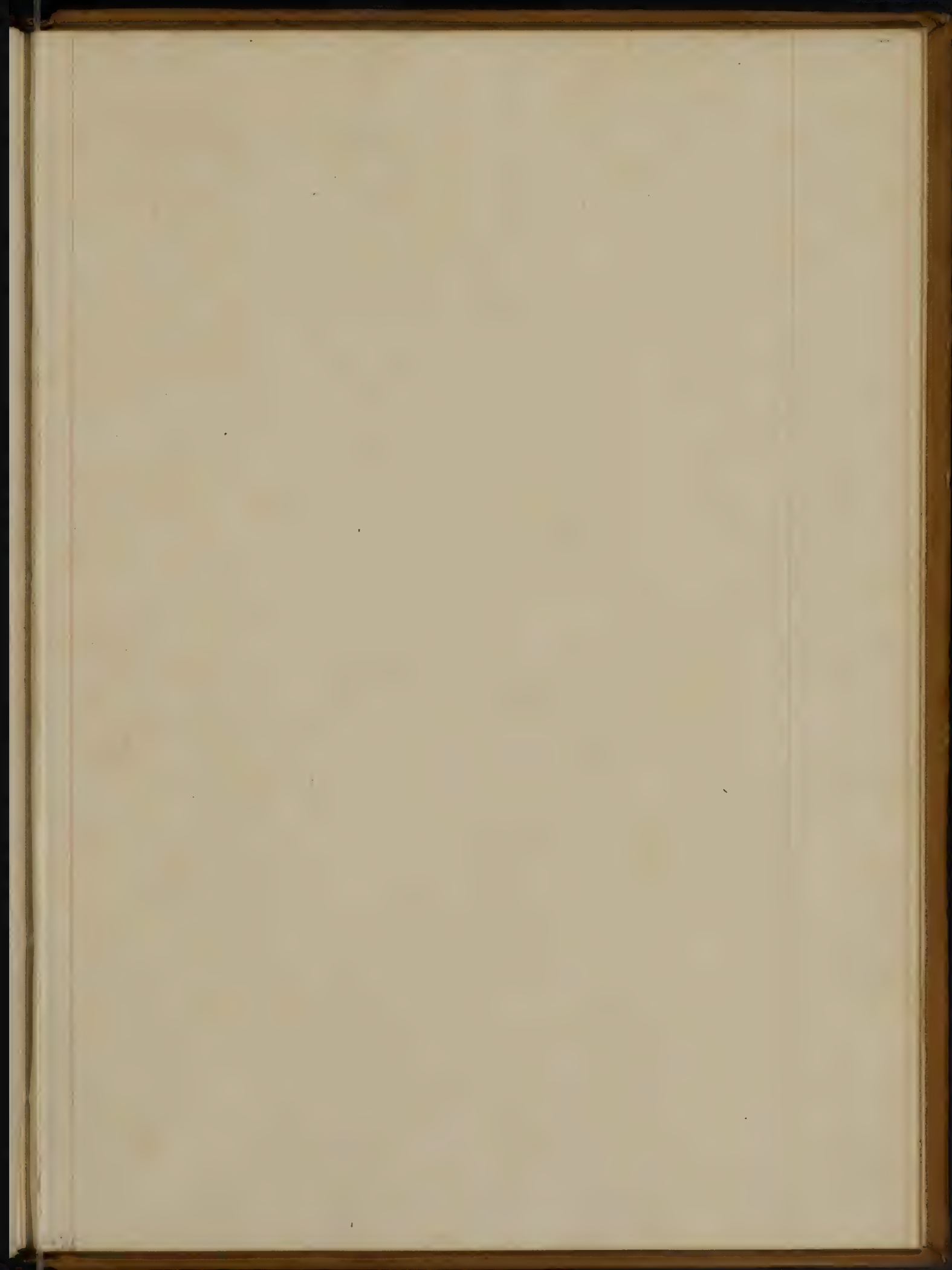




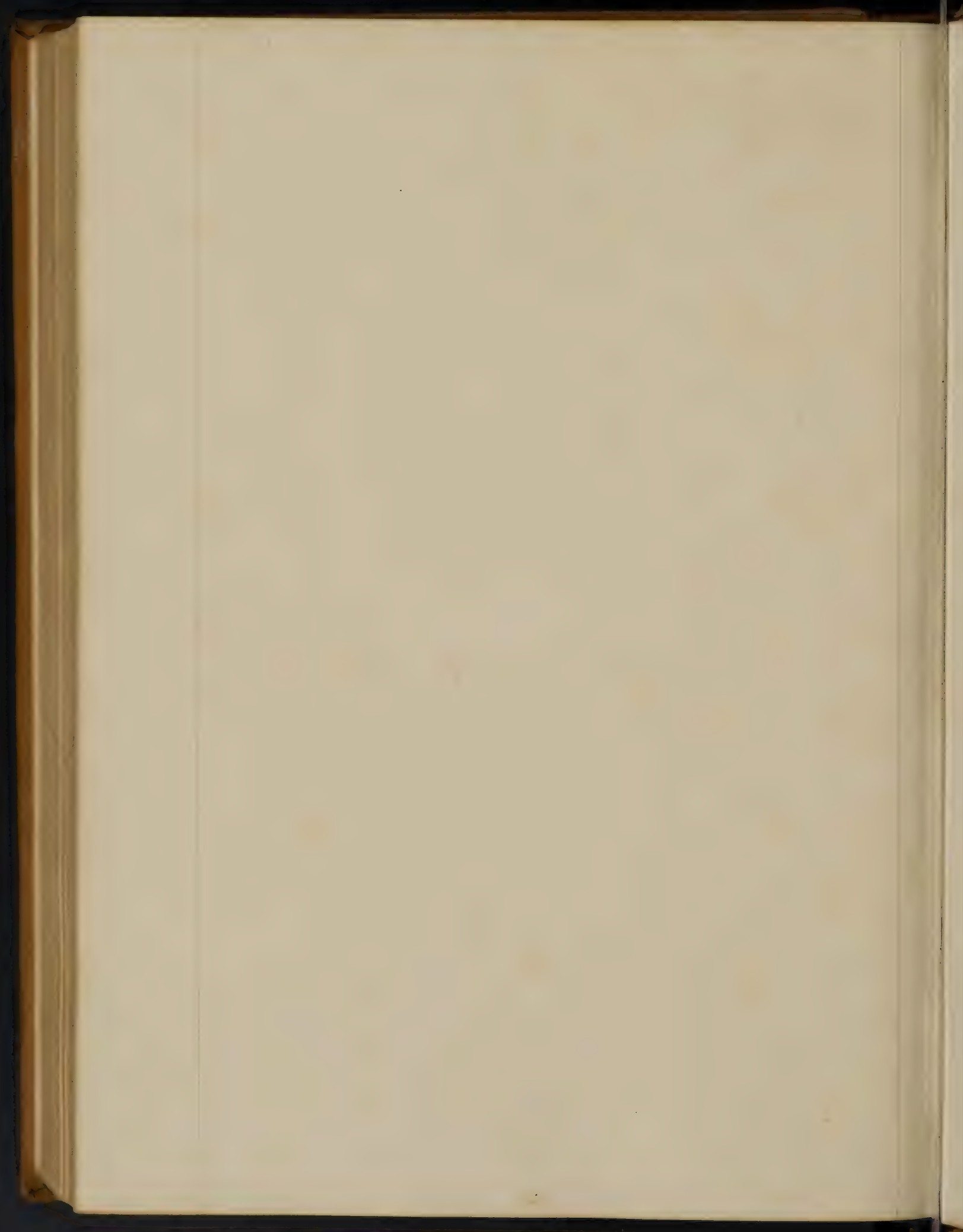


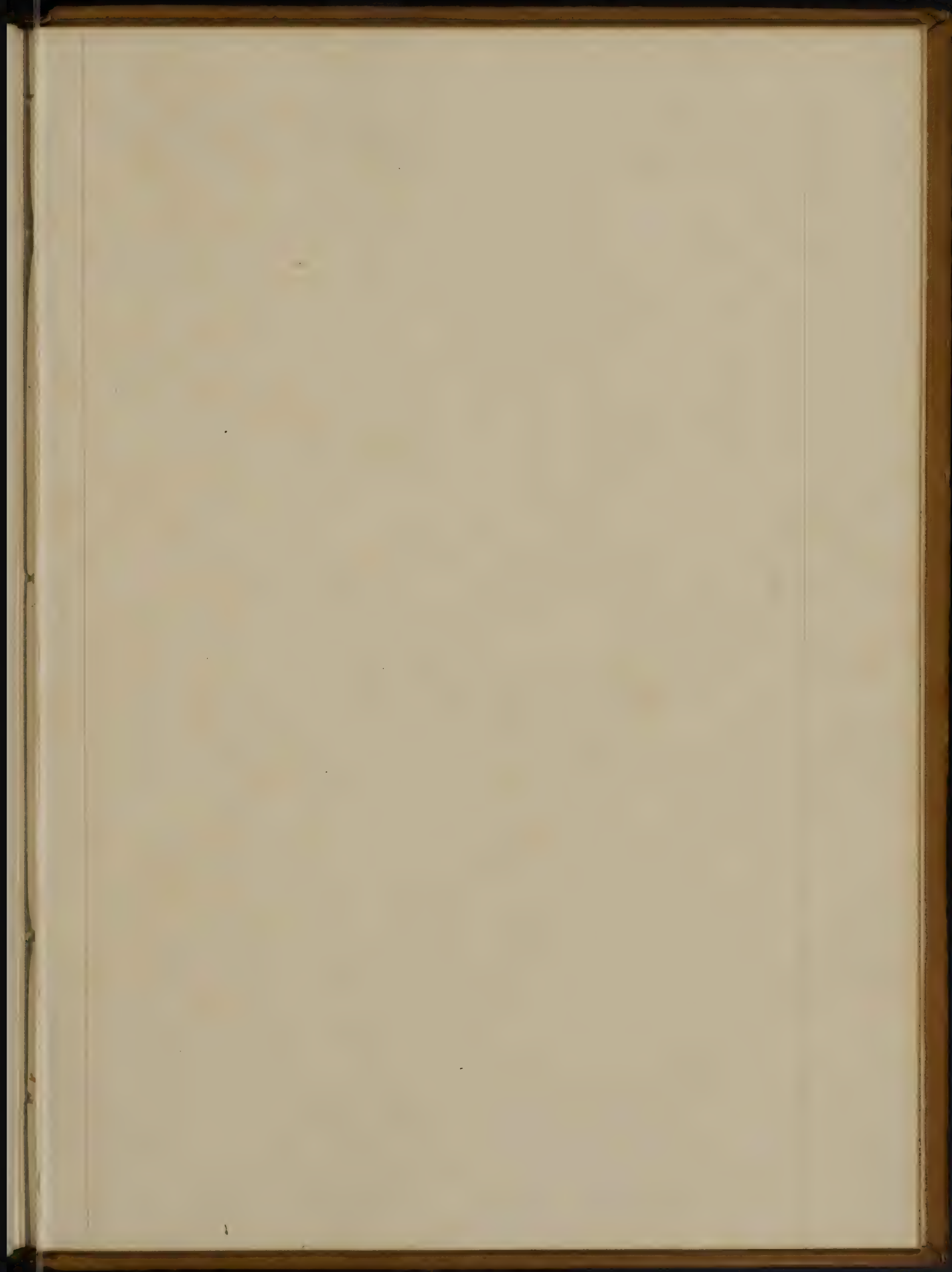




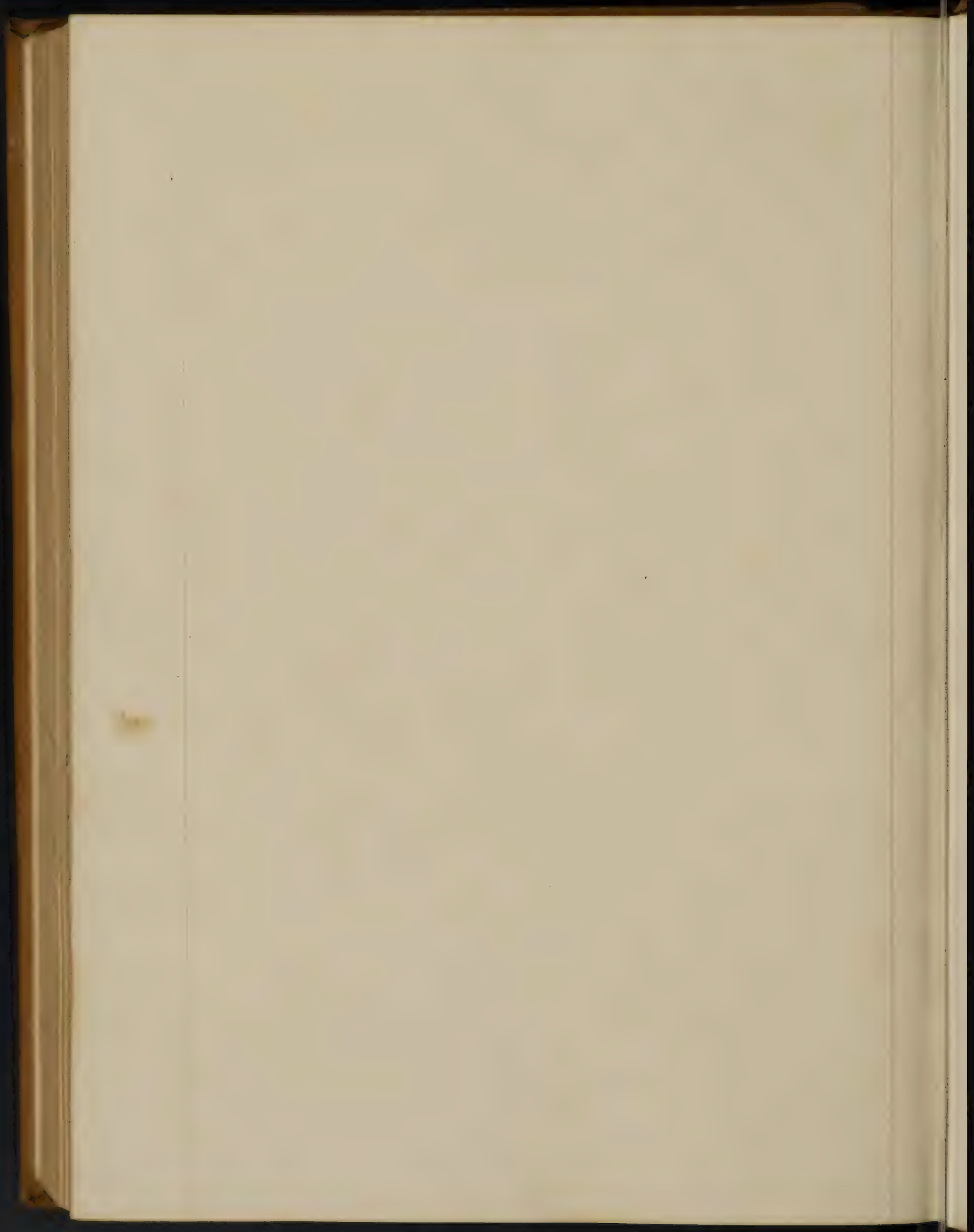


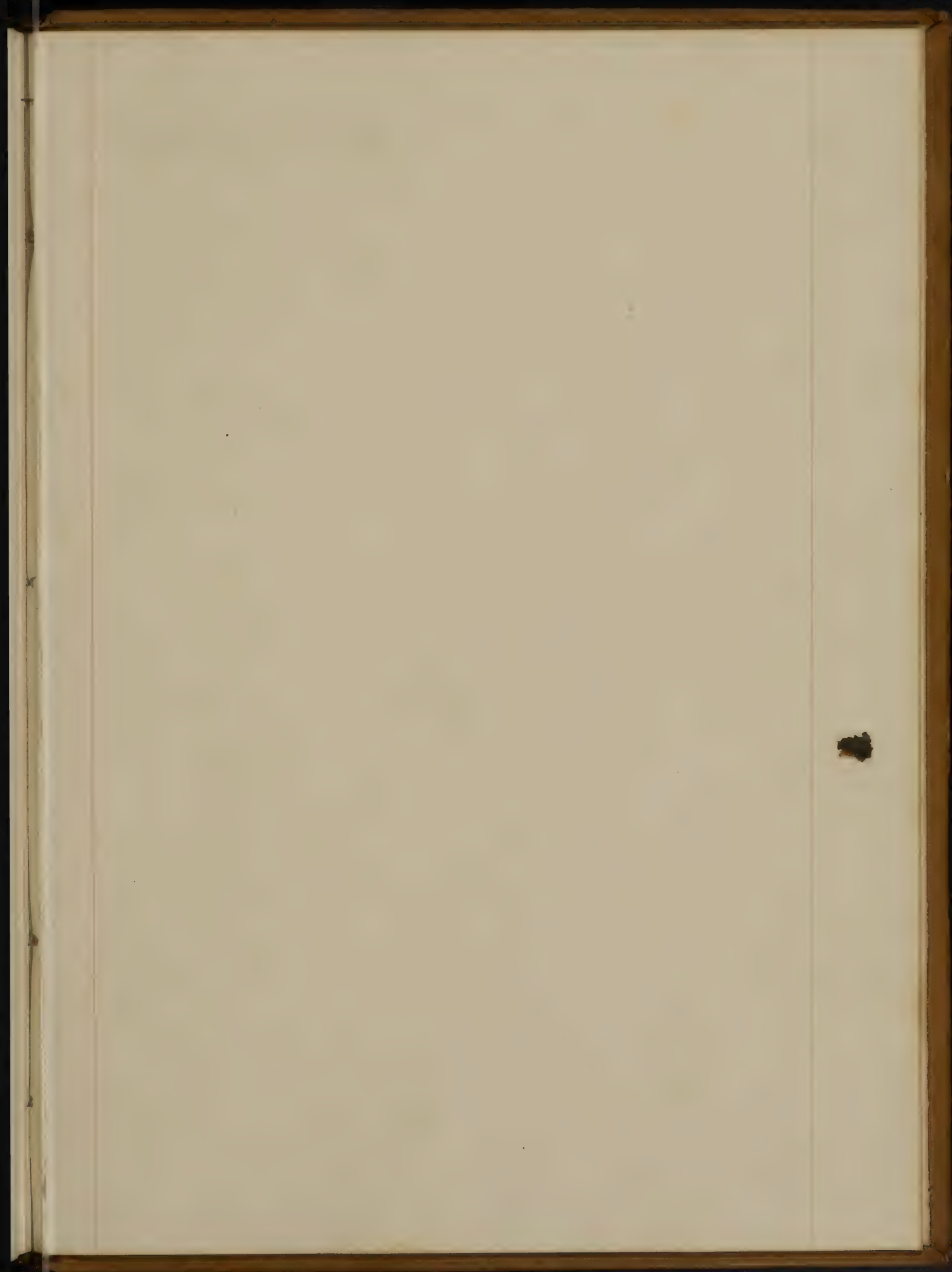




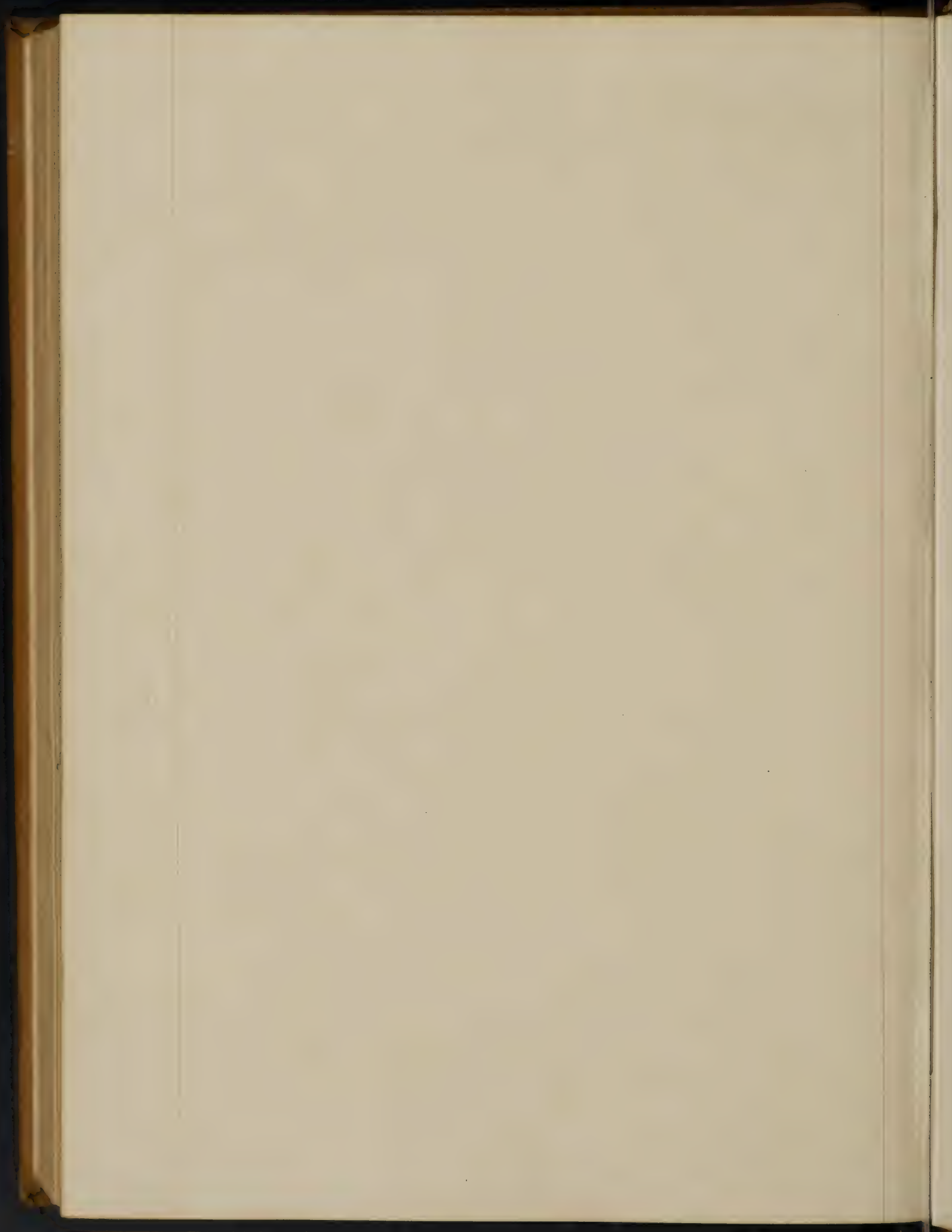


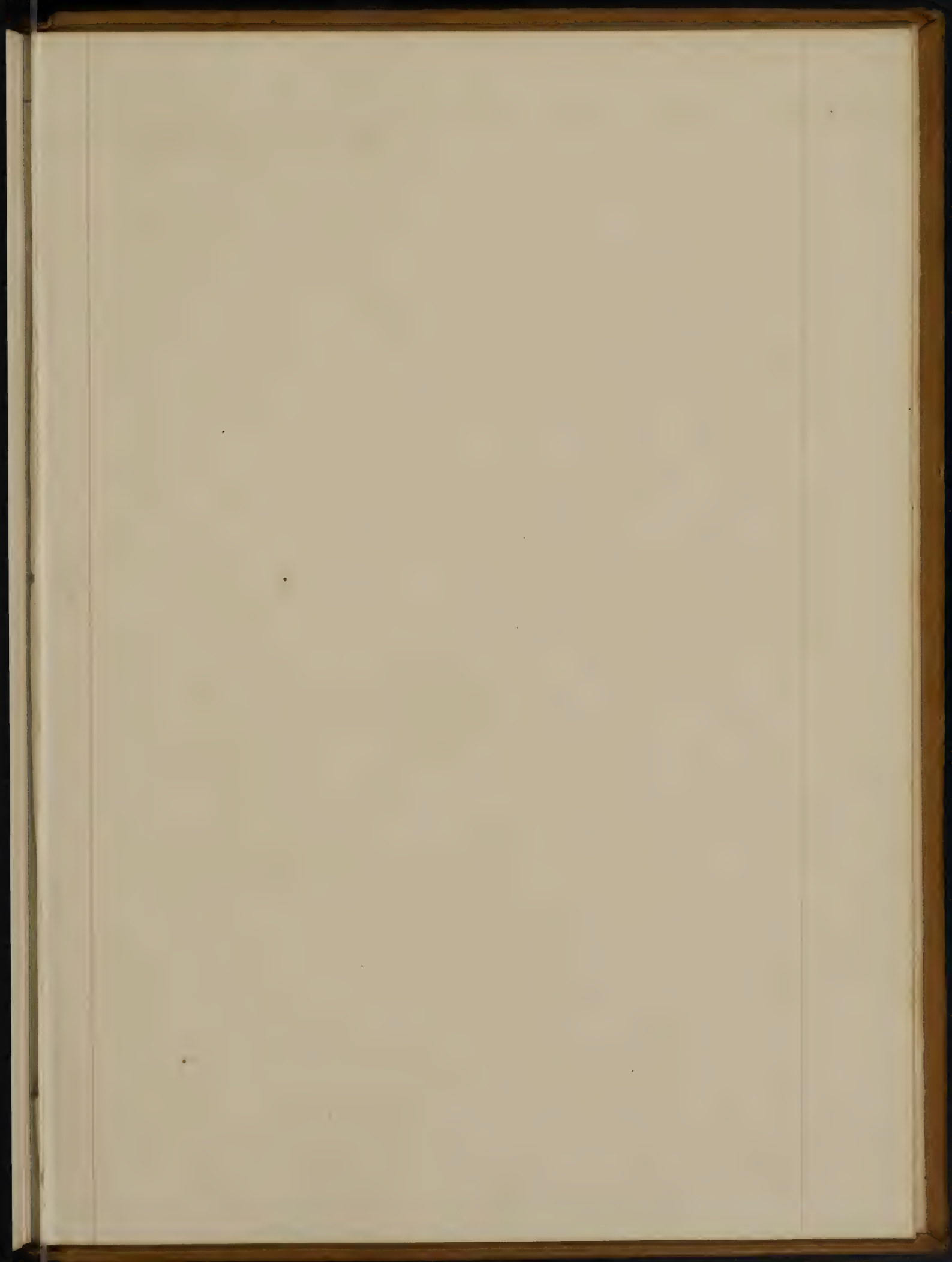




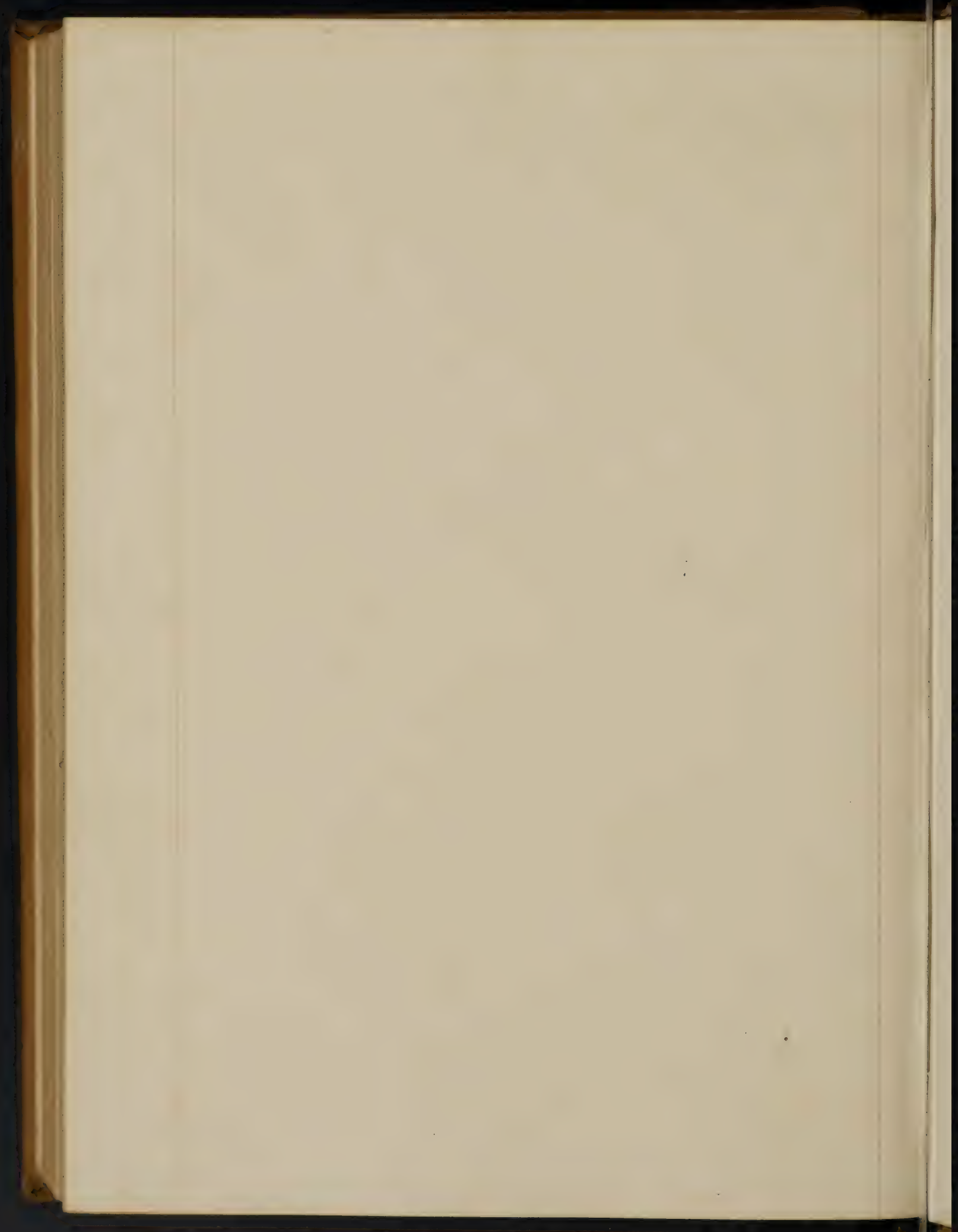


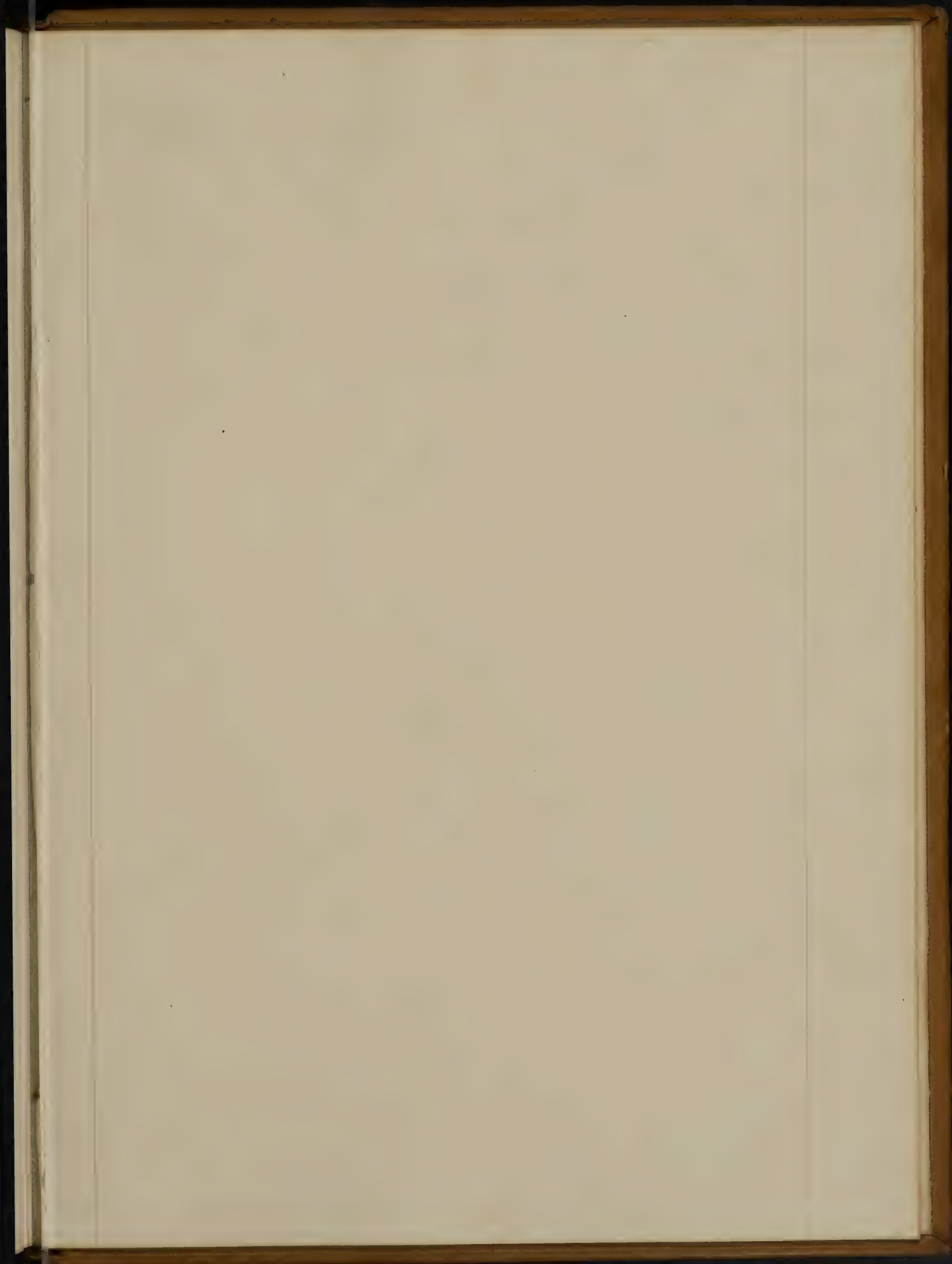




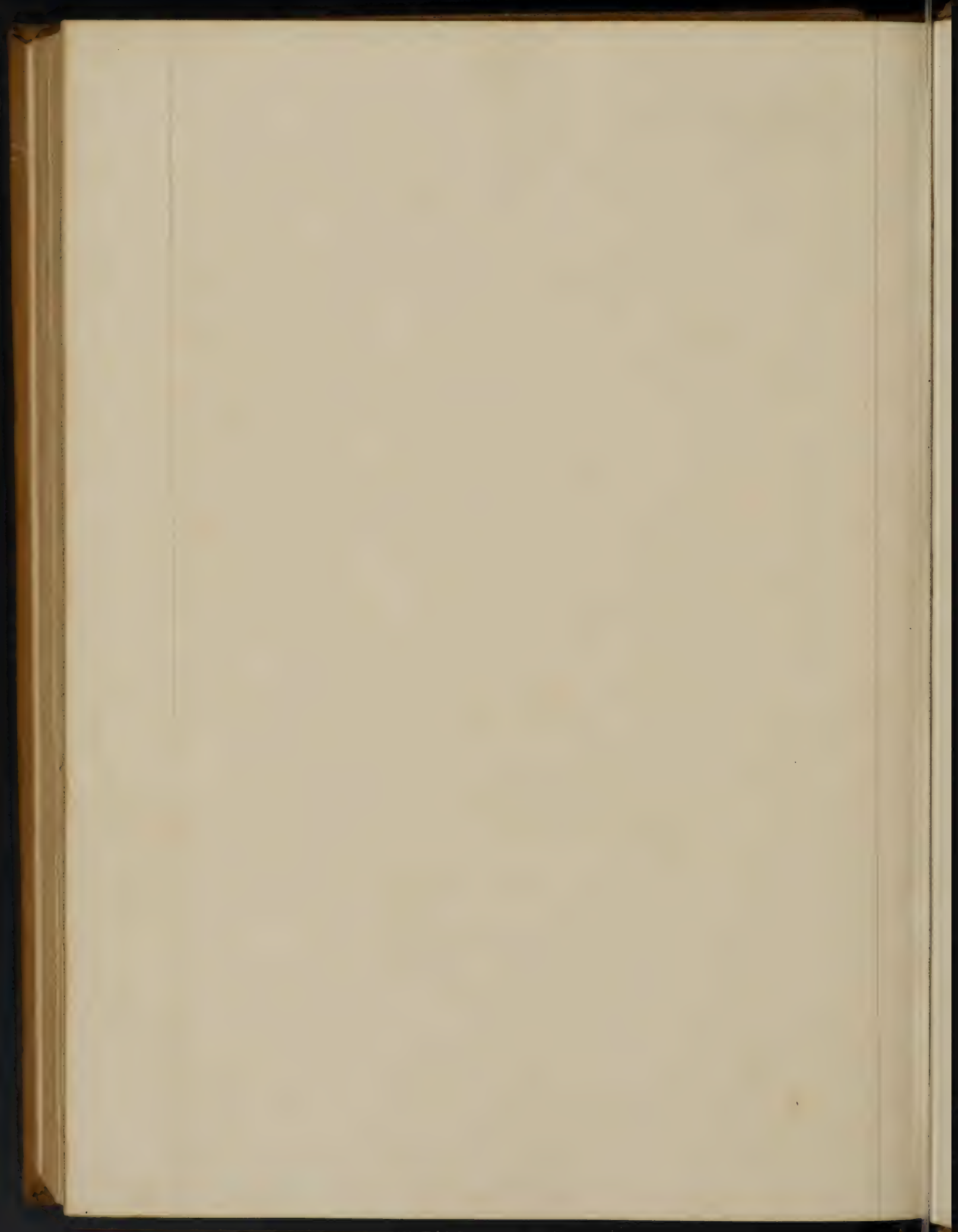


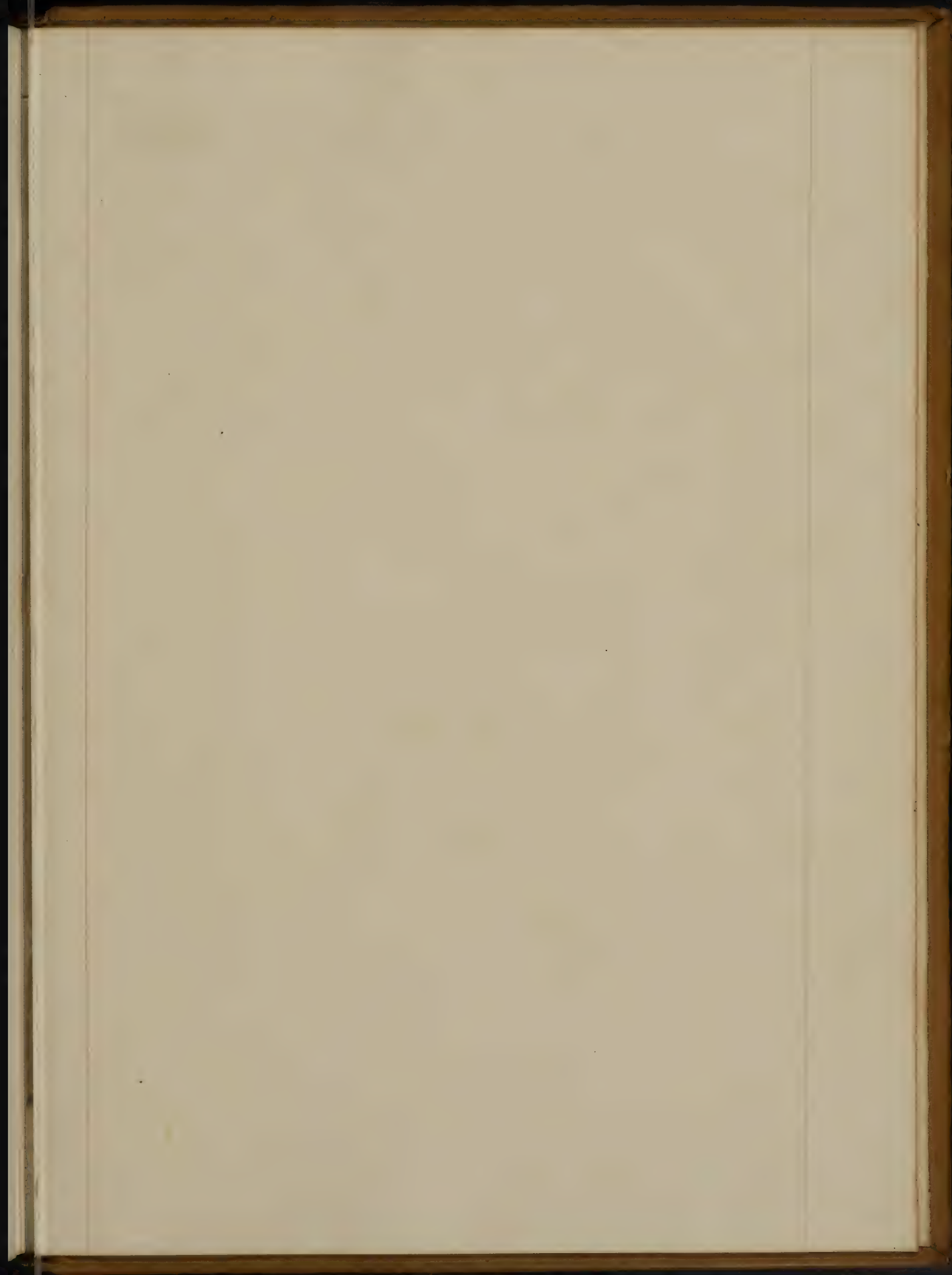




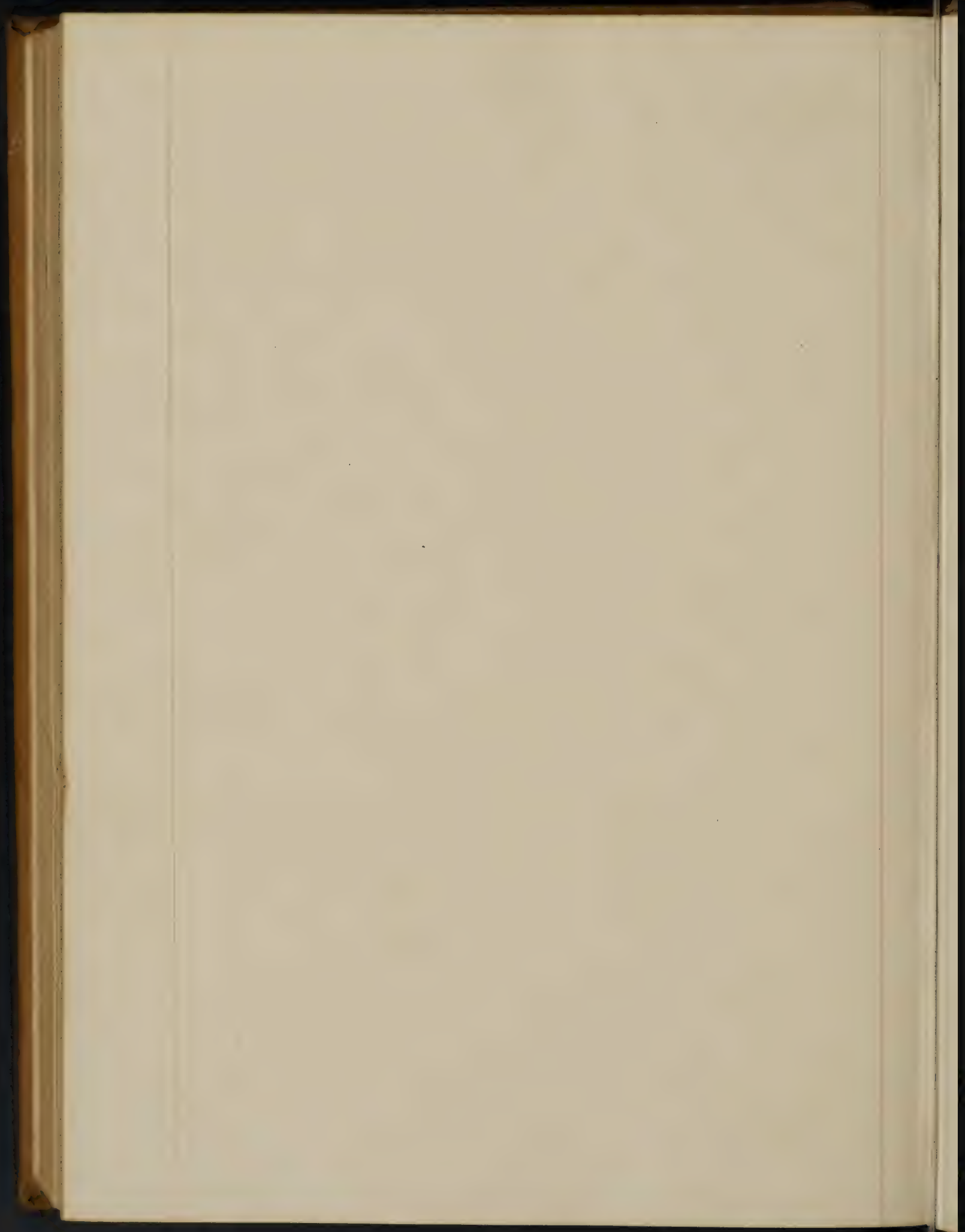


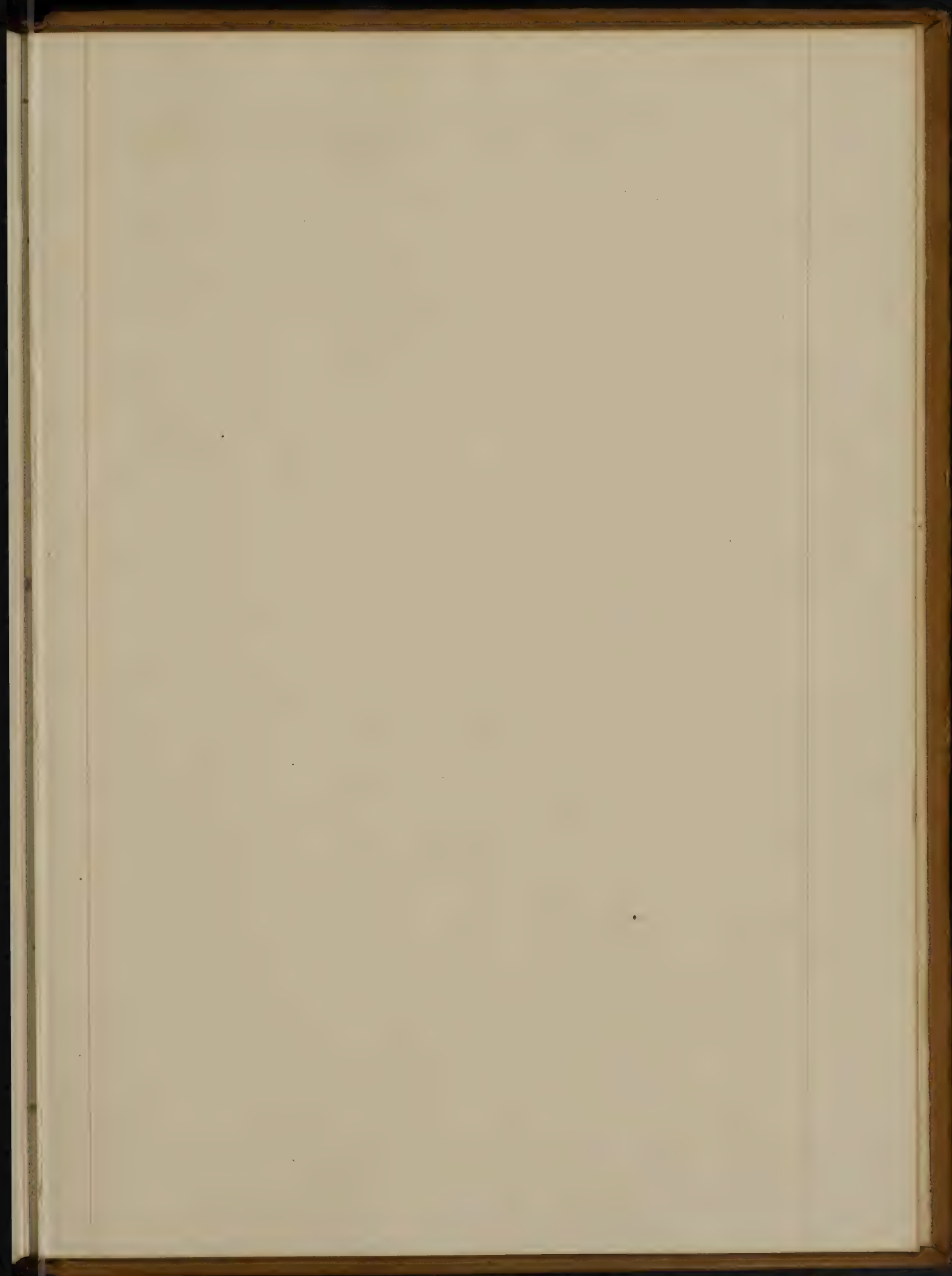




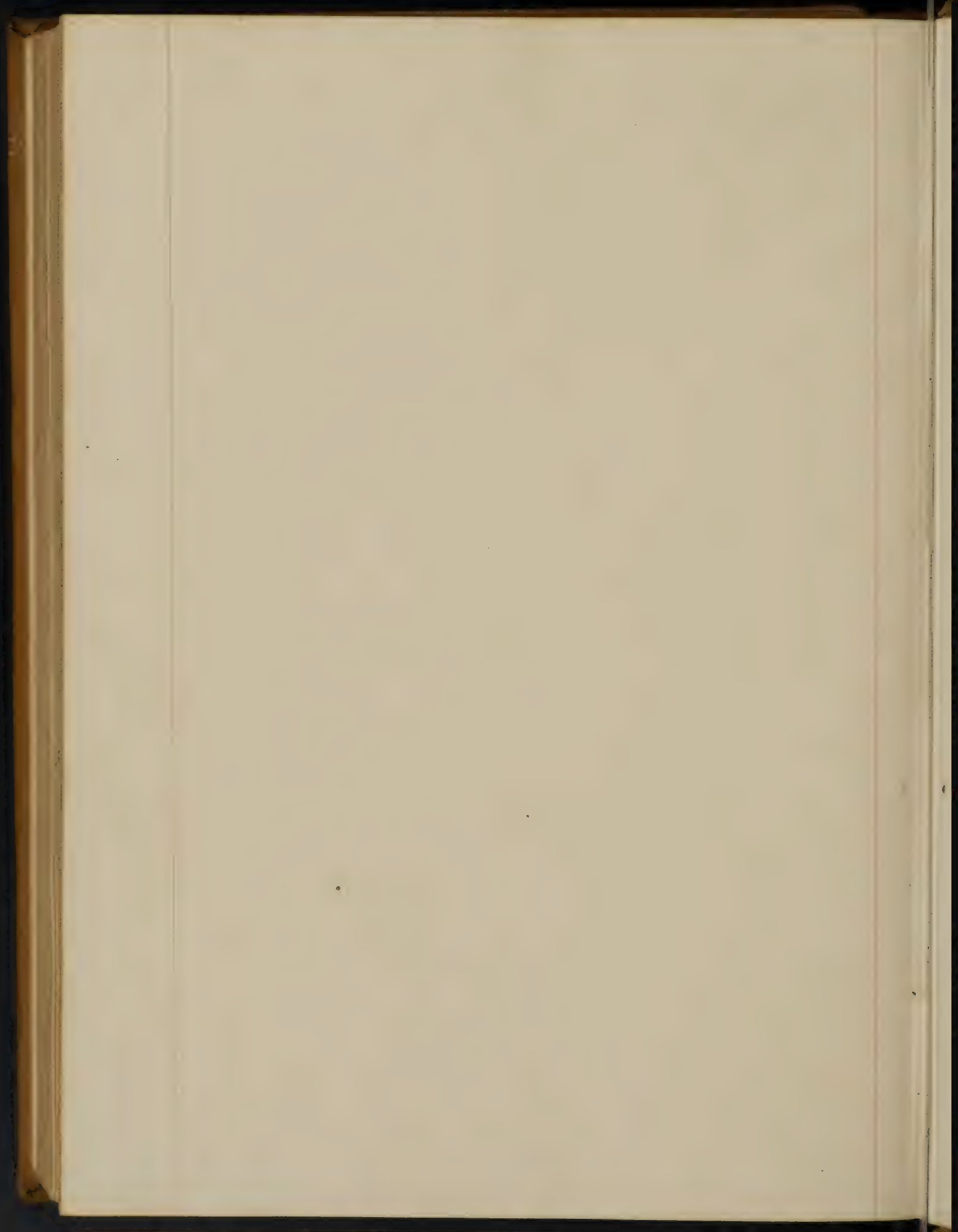


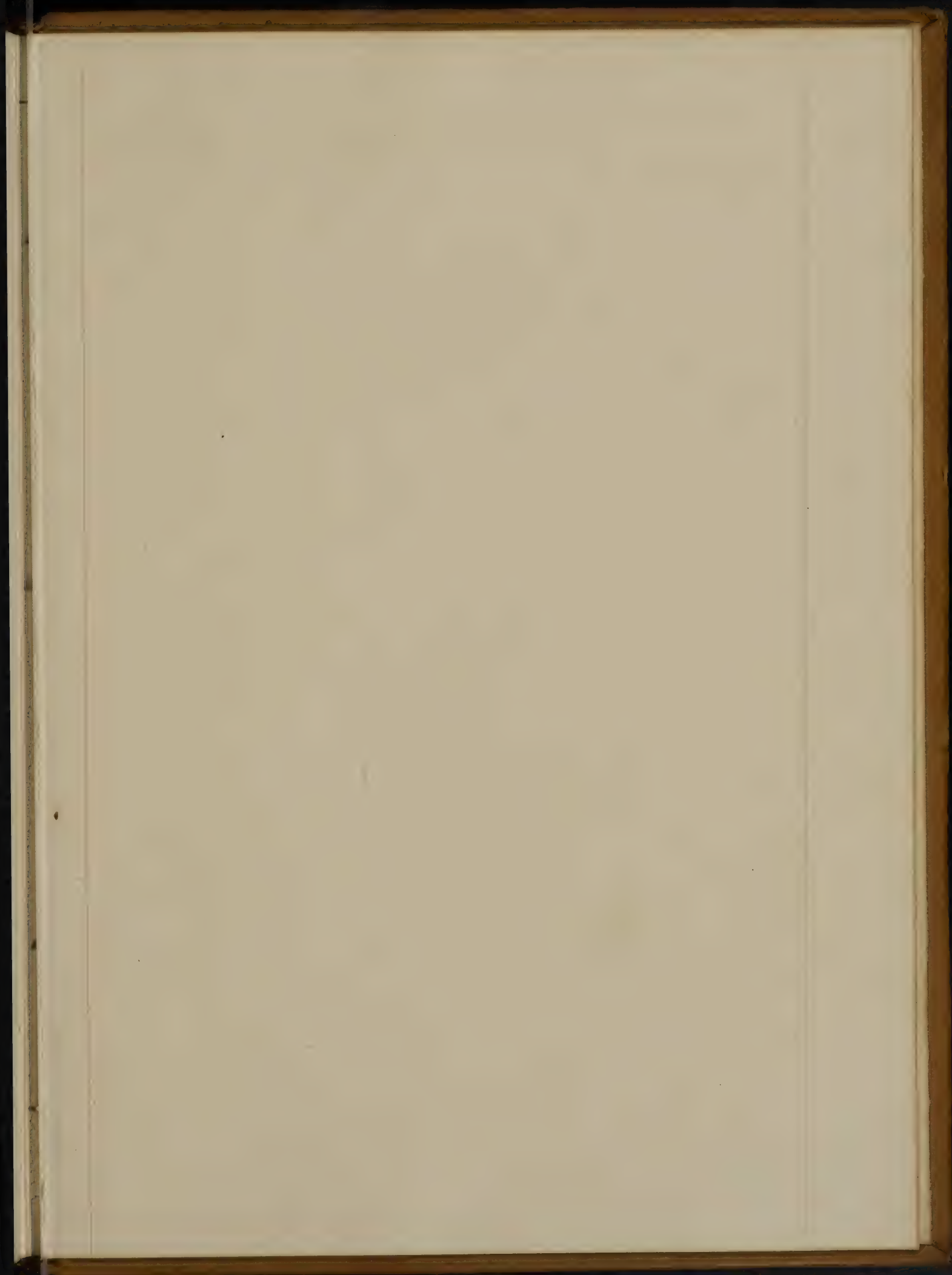




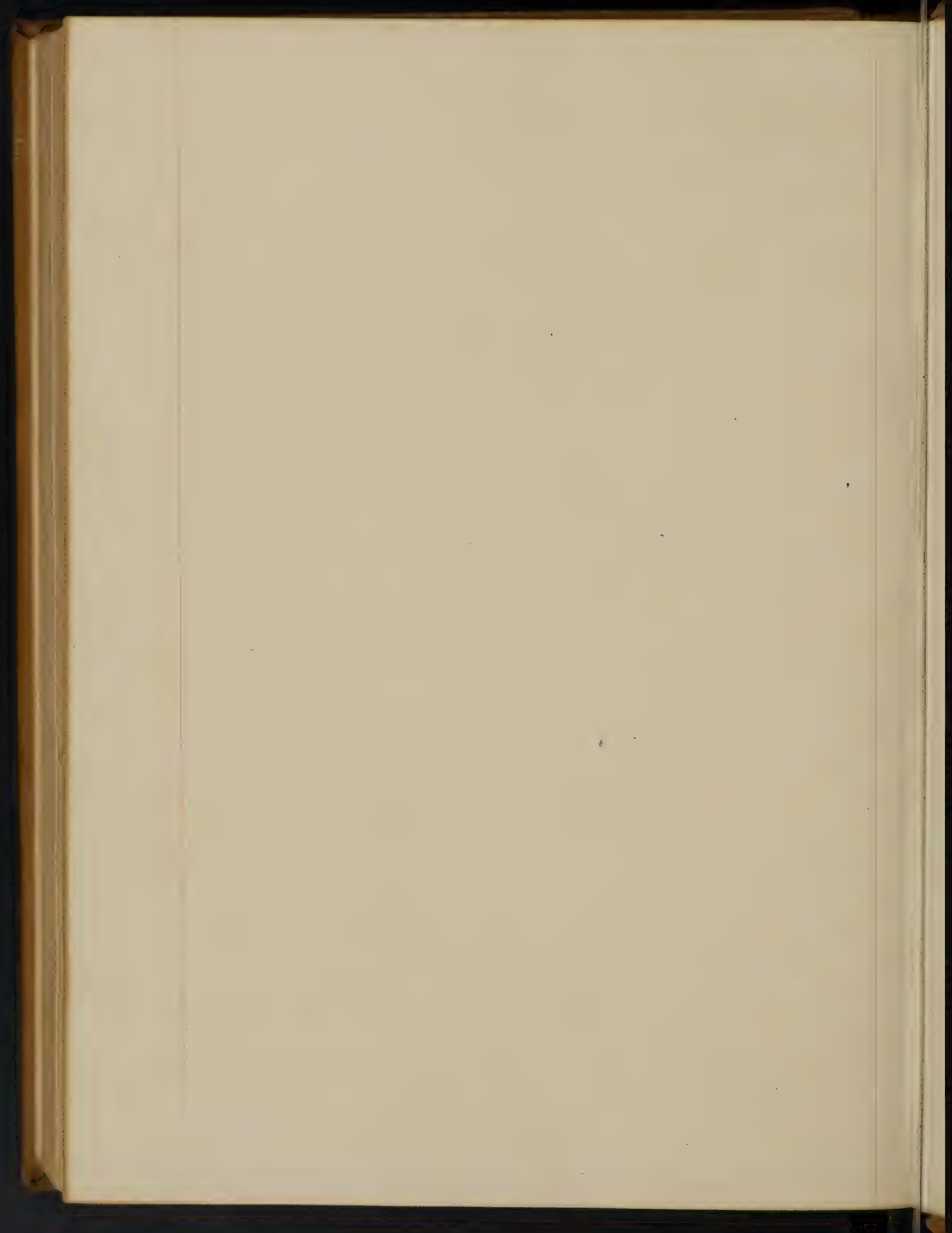


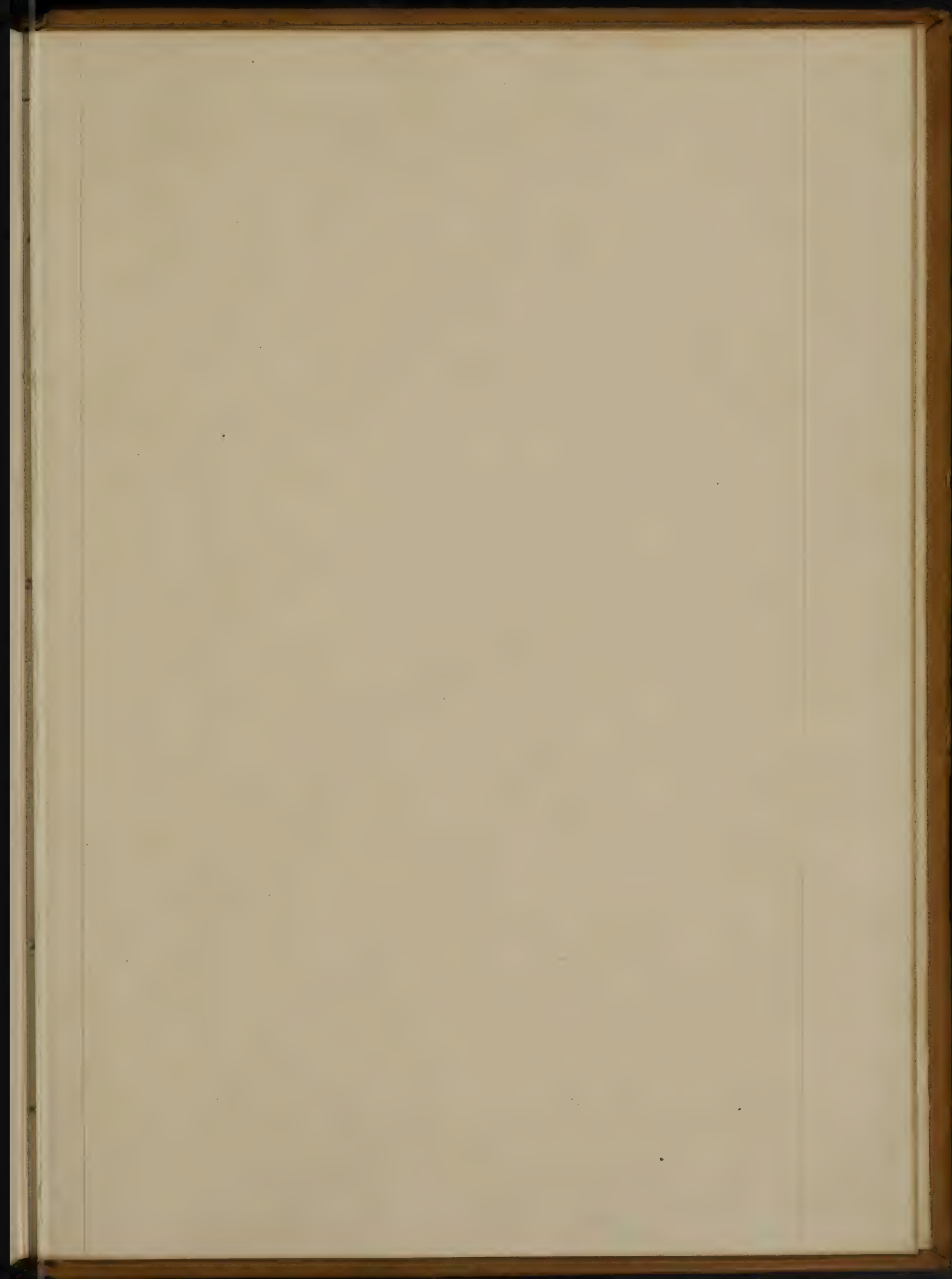




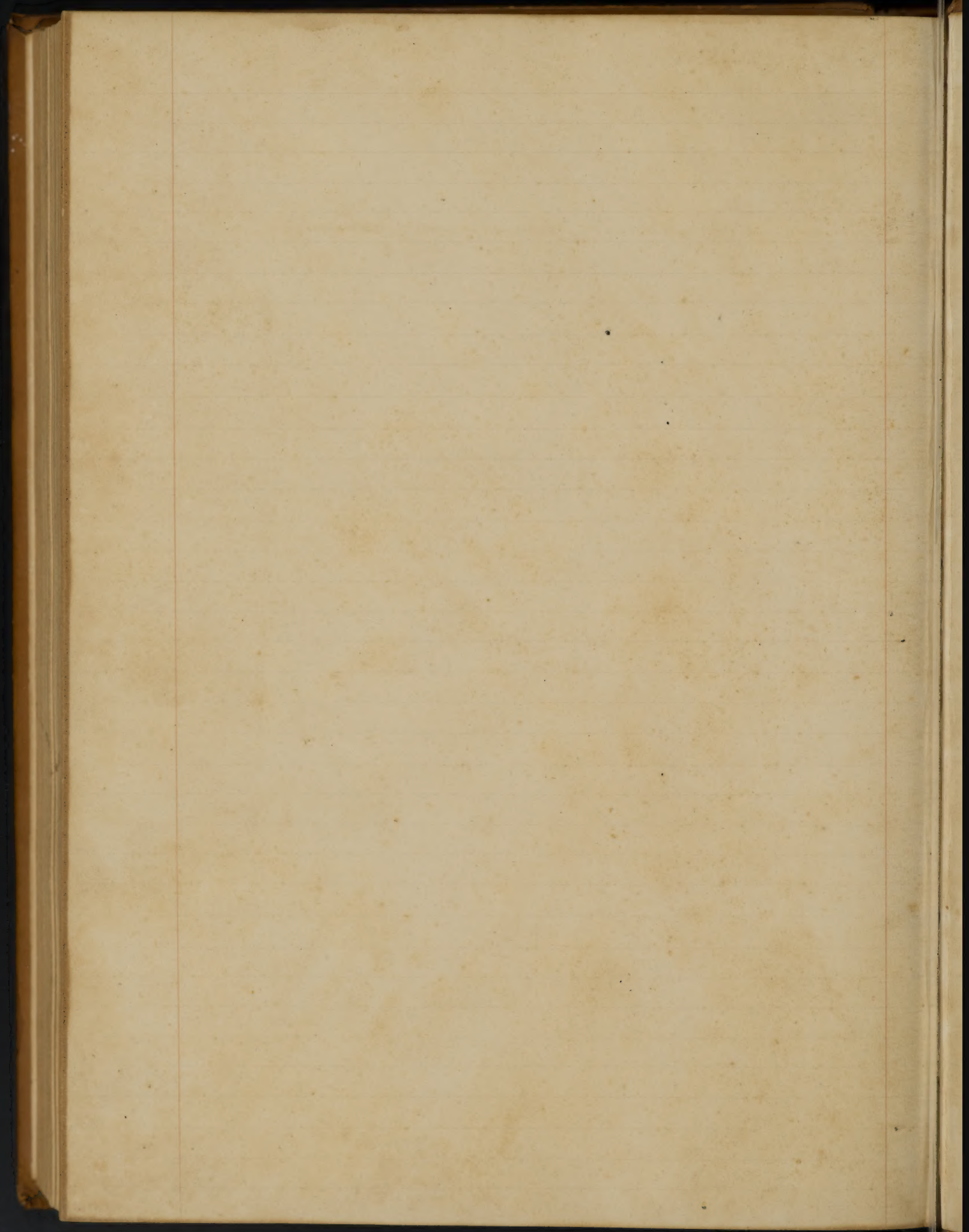












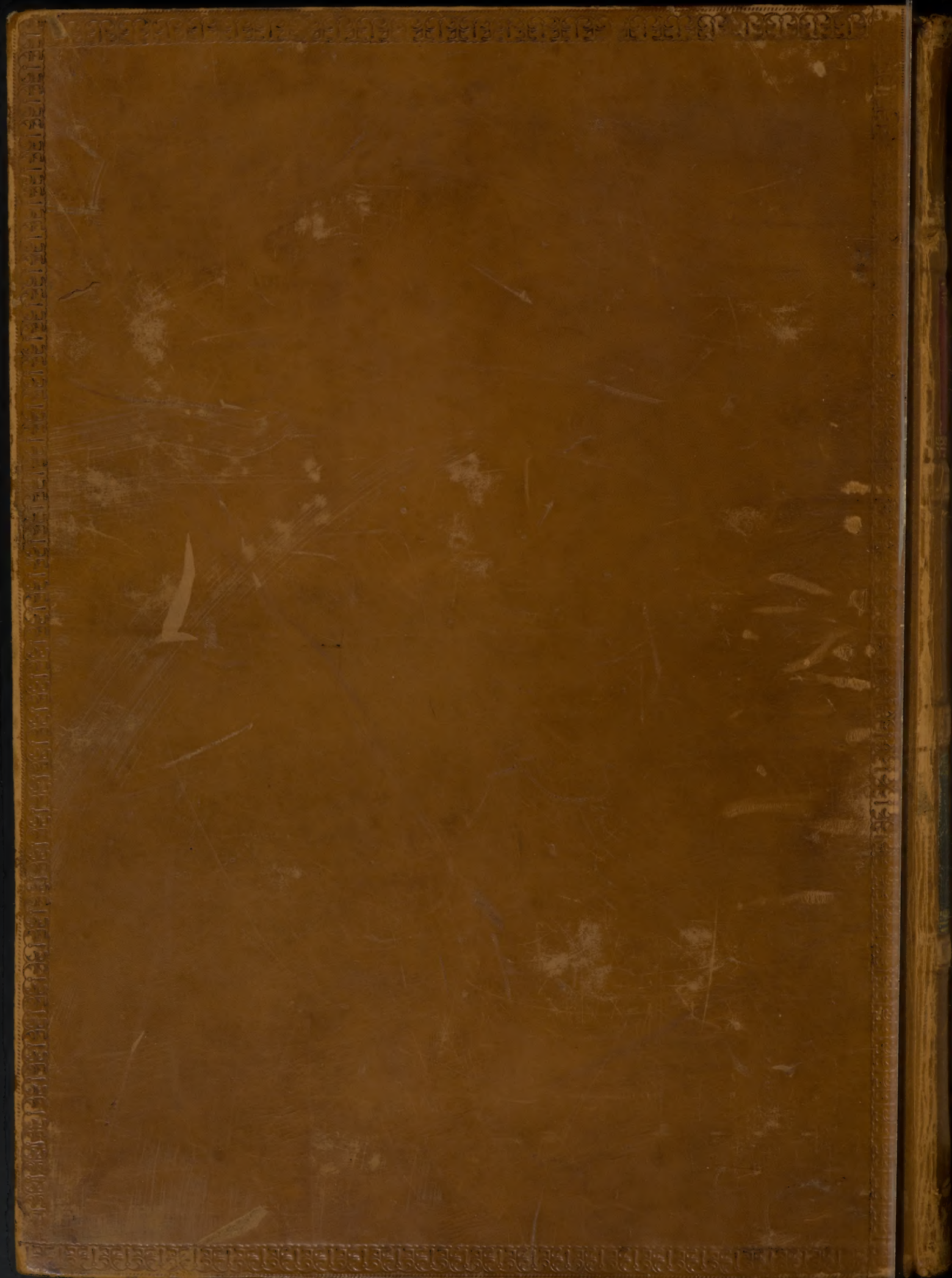


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Patrons Fund

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A. POTTER